

1
2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481

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6 In the Matter of:

7
8 DELPHI CORPORATION, ET AL,

9
10 Debtor.

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12 - - - - -x

13
14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17
18 January 10, 2008

19 10:14 AM

20
21 B E F O R E:

22 HON. ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE
24
25

Hearing re Doc #10931; Notice of presentment of claims
objection hearing with respect to debtor's objection to proof
of claim no. 16573 (Tower Automotive, Inc.).

HEARING re Doc #10976; Debtor's amended statement of disputed
issues with respect to proof of claim no. 16573 (Tower
Automotive, Inc.)

HEARING re Doc #5452; Third omnibus claims objection with
respect to debtor's objection to proof of claim no. 12813.

HEARING re Doc#6968; Claims objection hearing regarding claims
of Contrarian Funds LLC as assignee of ETCO.

HEARING re Doc #11685; Notice of presentment of joint
stipulation and agreed order disallowing and expunging proof of
claim number 12183 - MJ Celco.

HEARING re: Doc #11686; Notice of presentment of joint
stipulation and agreed order (I) compromising and allowing
proof of claim number 16573 and (II) disallowing and expunging
proof of claim number 15221 (Tower Automotive, Inc.).

1 HEARING re Doc #11687; Notice of presentment of joint
2 stipulation and agreed order compromising and allowing proof of
3 claim number 9080 and 9081 Benecke Kaliko Ag.

4
5 HEARING re Doc 11688; Notice of presentment of joint
6 stipulation and agreed order compromising and allowing proofs
7 of claim number 10381; 12668, 12670 and 16271, and disallowing
8 and expunging proof of claim number 16374.

9
10 HEARING re Doc 11689; Notice of presentment of joint
11 stipulation and agreed order compromising and allowing proof of
12 claim number 813 (Contrarian Funds, LLC as transferee of
13 Entergy Mississippi, Inc.).

14
15 HEARING re Doc 11690; Notice of presentment of joint
16 stipulation and agreed final order compromising and allowing
17 proofs of claim numbers 7571 and 7572.

18
19 HEARING re Doc 5452; Debtor's objection to proof of claim no.
20 1279 Nu-Tech Plastics Engineering, Inc.

21
22 HEARING re Doc 11788; Proposed seventeenth claims hearing
23 agenda.

1 HEARING re Doc 7999; Claims objection hearing regarding claim
2 of Entergy Mississippi, Inc.

4 HEARING re Doc 8270; Claims objection hearing regarding claims
5 of Montgomery County Treasurer.

7 HEARING re Doc 8617; Claims objection hearing regarding claim
8 of SPCP Group, LLC as assignee of key plastics.

10 HEARING re Doc 9151; Claims objection hearing regarding claims
11 of Federal-Mogul Corporation.

13 HEARING re 9535; Claims objection hearing regarding claims of
14 Northern Engraving Corporation.

16 HEARING re Doc 10783; Claims objection hearing regarding claim
17 of the SPCP Group, LLC as assignee of Beaver Manufacturing
18 Company.

25 Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

THE COURT: Okay. Delphi Corporation.

MR. LYONS: Good morning, Your Honor. John Lyons on behalf of Delphi Corporation. This is the seventeenth claims hearing we've had with Your Honor. Here with me in court today we have Tom Matz, my partner Al Hogan and Nick Campanerio from Skadden and we have Karen Kraft and Dean Unrue from Delphi. Mr. Hogan is also going to introduce some other Delphi witnesses who are here for the Nu-Tech matter.

Your Honor, I propose to move very quickly through the agenda, certainly the uncontested portion of the agenda so we can turn our attention to the Nu-Tech contested matter.

THE COURT: Okay.

MR. LYONS: Your Honor, the first three items are going to be adjourned. That of Conastoga Rivers, that's a motion to file a late claim. That's being adjourned to January 31st. The second matter, the State of Michigan, that's a claims matter. That's going to be adjourned to the February 20th claims hearing. And the motion of Samsung to reconsider an expunged claim, that is being adjourned to January 31st.

THE COURT: Okay.

MR. LYONS: Your Honor, we have an additional twelve matters relating to uncontested matters that we have settled. I will quickly go through, Your Honor, what the asserted amount is and what the settled amount is. The terms of the

1 stipulations themselves are going to be submitted, Your Honor.
2 And certainly, if you have any questions you can --

3 THE COURT: Unless you have any agreements with
4 parties about things you need to put on the record -- the
5 stipulations also set forth the settled amounts and the
6 asserted amounts.

7 MR. LYONS: They do, Your Honor.

8 THE COURT: Correct? So I don't think you need to go
9 through those.

10 MR. LYONS: Okay.

11 THE COURT: I'll just rely on the agenda.

12 MR. LYONS: Okay. Very good. Well, one matter I
13 would like to mention is Tower, Your Honor. We had some very
14 helpful assistance from Jonathan Flaxer as mediating that --
15 that particular claim.

16 THE COURT: Okay.

17 MR. LYONS: Your Honor, with that I'll turn the
18 podium over to my partner, Al Hogan, for the Nu-Tech matter,
19 unless Your Honor has any questions.

20 THE COURT: Let me just look through the agenda. No,
21 that's fine. Thank you.

22 MR. LYONS: Thank you, Your Honor.

23 MR. HOGAN: Good morning, Judge. Al Hogan from
24 Skadden Arps, Slate, Meagher and Flam for the debtors. We're
25 here today for the contested claims hearing with respect to

1 proof of claim number 1279 filed by Nu-Tech Plastic
2 Engineering, Inc.

3 Judge, as we typically do in the contested claims
4 proceedings, with Your Honor's permission we'll deal with the
5 evidentiary matters first. We have, by agreement of the
6 parties, a somewhat modified procedure today. We have all of
7 our witnesses in court but the parties have agreed to make
8 these submissions, in essence, on the papers subject to
9 Your Honor having questions of the witnesses.

10 THE COURT: Okay. So said differently or said
11 otherwise, the parties themselves do not wish to cross examine
12 the witnesses who've submitted declarations or affidavits but
13 they're here in case I want to ask them questions, at which
14 point, of course, the parties would be free to cross or re-
15 direct.

16 MR. HOGAN: Or to follow-up, yes. And Judge, in the
17 evidentiary materials we've submitted the parties did agree to
18 designate the depositions and do counter-designations. Those
19 are in as per discussions by the party and there's no -- no
20 problem on those.

21 THE COURT: Okay. All right.

22 MR. HOGAN: All right. Judge with respect to the
23 evidentiary record, in the exhibit binders there are fifty-one
24 numbered exhibits with just a few exceptions. There's
25 agreement of the parties as to the admissibility of the

1 evidence. I would just go through a couple of items where we
2 wanted to make sure that we were clear in terms of what the --
3 what the evidence was.

4 Exhibit number 44 is the debtor's demonstrative
5 timeline. Judge, that's not being admitted as substance of
6 evidence but it is a demonstrative. It is the --

7 THE COURT: Okay.

8 MR. HOGAN: -- debtor's view of the case. With
9 respect to the -- the other documents, the only disagreement
10 among the parties is with respect to item number 11. That is
11 the affidavit of John W. Maley (ph.). There's a dispute about
12 that and I'll address it in a moment. There's also,
13 technically, item number 12 and 13, the debtor's aren't
14 offering those as evidence. Those are there just to show the
15 required notice under -- under the Federal Rule of Evidence.

16 With respect to all of the other exhibits, I
17 understand there's -- there's no dispute, based on what I've
18 said, and so I'd move for the admission of everything other
19 than item number 11.

20 THE COURT: Which is, again, the Maley affidavit?

21 MR. HOGAN: Yes, sir.

22 THE COURT: Okay.

23 MR. SCHWARTZ: Jay Schwartz on behalf of Nu-Tech,
24 Your Honor. The only -- the demonstrative exhibit, also, is
25 not being admitted into evidence.

1 MR. HOGAN: As we discussed.

2 THE COURT: Right.

3 MR. SCHWARTZ: Yes. Everything else he said is
4 accurate.

5 THE COURT: All right. Okay. All right. So as --
6 as counsel for the debtors has just summarized, I will admit
7 into evidence the items that the parties have agreed upon, as
8 being admissible. And let me hear you, then, briefly on
9 Mr. Maley's affidavit, which I gather is being objected to on
10 the basis of hearsay?
11 (All uncontested exhibits were hereby received as Exhibits 1-51
12 for identification, as of this date.)

13 MR. HOGAN: That is correct, Judge. Judge, if I
14 could, my colleague, Nick Campanerio, who has assisted me on
15 this case, if I could cede the podium to him to discuss this
16 affidavit, if that's all right with Your Honor?

17 THE COURT: Okay.

18 MR. HOGAN: Thank you, Judge.

19 MR. CAMPANERIO: Good morning, Your Honor. Nick
20 Campanerio on behalf of -- on behalf of the debtors. The
21 affidavit of John Maley has been objected to on hearsay grounds
22 by Nu-Tech. John Maley was the president, he was the chief
23 executive officer and he was the majority owner of Nu-Tech
24 during the time period -- the relevant time period in this
25 case. And the requirements of Rule 807 of the Federal Rules of

1 Evidence are satisfied here.

2 There's no dispute that Nu-Tech received notice of
3 our intention to present this affidavit here today. Those
4 notices are in the record. Mr. Maley's affidavit addresses
5 material facts concerning Nu-Tech's relationship with Delphi as
6 it relates to the specific part we're talking about here and
7 also to the allegation that Nu-Tech received a promise of a
8 replacement part once Nu-Tech lost that business. And it is
9 the most probative evidence on those points. And I'm just
10 going to give you one example of that. Excuse me -- sorry.
11 One example of that -- at his deposition a couple of weeks ago
12 Mr. Cooper testified, with respect to the promise of the
13 replacement part, that the person who received that promise was
14 John Maley and that he did not personally receive that promise.
15 That's in the record. That's Exhibit 49 at page 29.

16 At that point Mr. Maley becomes very important for
17 the claim because he's the only one that can know who made the
18 promise, was it someone from GM? Was it someone from Delphi?
19 He's the only person that can tell us when the promise was made
20 and he's the only one who has the knowledge about what was
21 actually said. Mr. Maley's affidavit addresses that point and
22 he says, very clearly, that there was no such promise and
23 that's at paragraph 12.

24 Another factor under Rule 807 is trustworthiness.
25 This is an affidavit; therefore it's a sworn statement.

1 Mr. Maley made this statement under penalty of perjury. His
2 testimony is corroborated by other evidence that's in the
3 record. For example, on the promise point, Trinia Patrick
4 (ph.), who's a former Delphi buyer who is now assisting Nu-Tech
5 in this litigation, also says in her affidavit that she's not
6 aware of any such promise of replacement business to Nu-Tech.
7 And so that adds further indicia of trustworthiness to Maley's
8 statement.

9 And so on some note, the Rule 807 factors are
10 satisfied here. And I think that -- I think that the correct
11 answer on this is to admit the affidavit. And since we're in a
12 bench trial setting, Your Honor could give the affidavit
13 whatever weight it feels it is entitled to.

14 THE COURT: But you're relying on the residual
15 exception.

16 MR. CAMPANERIO: Correct.

17 THE COURT: And there are specific exceptions,
18 Nu-Tech's referred to one, which is based on the fact that
19 Mr. Maley's no longer with us. But in that case he had to have
20 been subject to examination. And is agreed that he was not on
21 this affidavit -- he was not deposed in connection with this
22 affidavit, right?

23 MR. CAMPANERIO: Correct, Your Honor. I would agree
24 that he was not deposed, in fact. But in terms of -- I think
25 it's important to -- to point out here that Nu-Tech had ample

1 opportunity to depose him.

2 THE COURT: But was -- when did the affidavit -- why
3 don't you elaborate on that?

4 MR. CAMPANERIO: Okay. The affidavit was executed by
5 Mr. Maley in March of 2005. Nu-Tech received notice of the
6 affidavit no later than September of 2005. And Nu-Tech chose
7 not to take the deposition of Mr. Maley at any point from the
8 time the affidavit was executed up until the time that he died.

9 THE COURT: But as far as the debtor's are concerned,
10 shouldn't I take into account the fact that the automatic stay
11 came into effect and then the claims procedures came into
12 effect to set up a whole regime for discovery and the like. I
13 mean, if they had sought --

14 MR. CAMPANERIO: Right. When --

15 THE COURT: -- unless -- unless they knew he was
16 really sick. You know, unless you -- unless they knew that,
17 you know, I might -- I might go with that point. But otherwise
18 wouldn't -- wouldn't you have -- wouldn't Mr. Butler or someone
19 have shown up here if they had sought to take his deposition
20 and say wait a minute, Judge, they're jumping the gun?

21 MR. CAMPANERIO: A couple of points in response, Your
22 Honor. It was no secrete that Mr. Maley's health was failing.
23 In fact, when Nu-Tech moved to lift the automatic stay one of
24 the subjects that was discussed in this courtroom during that
25 hearing was the fact that Mr. Maley's health was failing and

1 there was discussion about lifting the automatic stay for the
2 limited purpose of allowing Nu-Tech to take his deposition.

3 THE COURT: So you guys opposed it then?

4 MR. CAMPANERIO: Pardon me?

5 THE COURT: Did you all oppose that motion then?

6 MR. CAMPANERIO: No, I thought we had agreed to -- I
7 thought we had agreed to lift the stay for the purpose of
8 allowing you to take the deposition.

9 MR. HOGAN: Judge, I believe that's correct.

10 THE COURT: That's right. The order permits that.

11 MR. CAMPANERIO: And just one --

12 THE COURT: And did the affidavit -- the affidavit
13 preceded that, of course --

14 MR. CAMPANERIO: Correct.

15 THE COURT: -- because it was pre-petition.

16 MR. CAMPANERIO: Yeah, March 2005.

17 THE COURT: All right. Why aren't -- why aren't you
18 relying upon the admission against interest exception?

19 MR. CAMPANERIO: The reason we're not relying on the
20 Admission Against interest exception is that by the time Mr.
21 Maley swore out this affidavit in March 2005, he had
22 transferred his equity stake in Nu-Tech to Mr. Cooper.

23 THE COURT: Okay.

24 MR. CAMPANERIO: And so he was -- he, therefore, was
25 no longer --

1 THE COURT: So if Nu-Tech is properly the plaintiff
2 here, then he wouldn't benefit from it.

3 MR. CAMPANERIO: Correct.

4 THE COURT: Okay.

5 MR. CAMPANERIO: Thank you, Your Honor.

6 MR. SCHWARTZ: Just so the Court understands the
7 chronology, Mr. Maley -- the lawsuit in State Court started in
8 2002. And you'll hear some argument later that it was not
9 until 2005 that Delphi first raised an issue about the standing
10 of Nu-Tech. The filed a motion for summary disposition.
11 Nu-Tech opposed it, there was oral argument out and the judge
12 allowed a reply brief to be submitted. That is when Delphi
13 went and got the affidavit of Mr. Maley. Discovery was closed,
14 they got an affidavit and they attached it to a reply brief.
15 So there was not any opportunity to take his deposition in the
16 State Court action.

17 With respect to the Rule itself -- and the reason why
18 he had transferred his interest back to Mr. Cooper, there had
19 been litigation between Mr. Cooper and Mr. Maley. Mr. Maley
20 owed Mr. Cooper a lot of money and --

21 THE COURT: Well, no, they're not relying on the
22 adverse interest exceptions. So I don't think you need to get
23 into that.

24 MR. SCHWARTZ: Okay.

25 THE COURT: I mean, you're saying that, in a sense,

1 to say that he had a motive --

2 MR. SCHWARTZ: To fabricate.

3 THE COURT: Okay.

4 MR. SCHWARTZ: And which is one of the factors --

5 THE COURT: Which I guess is fair. I shouldn't have
6 cut you off because that -- that goes into 807 as well.

7 MR. SCHWARTZ: It does, Your Honor. And the case I
8 cite, and I know you're -- it sounds like you're familiar with
9 the rule is Sternhagen v Dow Co., 108 F. Sub 2d, 1113, which,
10 kind of, surveys all the different cases that have analyzed it
11 and the factors that you should look at. And if you look at
12 the majority of those factors, this affidavit shouldn't fall
13 within the exception. The -- this was not preserved on
14 videotape, so that no one could see his demeanor. It was not
15 subject to cross-examination. It was not in close proximity to
16 the events. He gave this deposition -- he gave the affidavit
17 in '05 and these events happened in 1999 or in 2000.

18 I disagree with Mr. Campanerio that it's
19 corroborated. Most of the evidence is - most of the things
20 that he says in his affidavit are not corroborated by anybody
21 in Nu-Tech. He had a motivation to fabricate because of the
22 litigation that he'd had with Mr. Cooper.

23 THE COURT: Well, on that score, was that litigation
24 still pending?

25 MR. SCHWARTZ: At the time that he gave his

1 affidavit, no. At the time he gave his affidavit he had
2 already lost. He'd lost a judgment and he gave back the stock
3 to Mr. Cooper.

4 THE COURT: So, at best, your point is that he had
5 sour grapes.

6 MR. SCHWARTZ: Correct.

7 THE COURT: Okay.

8 MR. SCHWARTZ: He was -- and some of the items that
9 he says are not based on personal knowledge. So, I don't think
10 it falls within the hearsay exceptions. I also think, with
11 respect to the claims procedure order, Judge, all witnesses are
12 supposed to be subject to cross-examination if they're going to
13 give evidence -- going to give testimony at trial.

14 THE COURT: Well, it's hard to do that if you're
15 dead. So, I think -- I think we can read an exception into the
16 procedures on that bases.

17 MR. SCHWARTZ: Very good. But those -- those are
18 the -- those are the basics. We didn't have an opportunity to
19 cross examine him, which we certainly would have done. And
20 therefore it shouldn't come and it doesn't fall within the
21 exceptions. There are specific exceptions for someone who is
22 deceased, other hearsay exceptions, which I did cite and you
23 commented on. And it doesn't fall within that.

24 THE COURT: Okay.

25 MR. HOGAN: Judge, I don't have anything further on

1 that point.

2 THE COURT: All right. I -- I understand that this
3 is a bench trial and under some circumstances where it's a
4 close call I would take that into account and just look at
5 credibility. But here I'm actually going to exclude the
6 affidavit. I believe that given the prior litigation between
7 Mr. Cooper, who's really the person who stands to gain here,
8 and Mr. Maley and what I think is fair to say the -- as far as
9 the laying the blame on the claimant for the failure to depose
10 Mr. Maley, it seems to me that knowing the contents of the
11 affidavit as much blame, if you will, could be laid on the
12 debtors not to arrange for his deposition given that the stay
13 had been lifted.

14 In any event, it seems to me that, particularly since
15 I think he is, in many respects, the only person testifying as
16 to a lot of the items in his affidavit. And that the
17 corroborating testimony is limited to just the knowledge of the
18 witness. So therefore it's not that strongly corroborative,
19 since it's just limited to her knowledge and she didn't have
20 control of the whole situation from the purchaser's point of
21 view, GM/Delphi. I don't believe that the purposes of the
22 hearsay rules would be served by having the affidavit admitted,
23 so I won't admit it.

24 MR. HOGAN: Okay. Very good, Judge. With that
25 exception, I believe all the documentary evidentiary issues are

1 taken care of.

2 Judge, I know you don't -- don't care for opening
3 statements. We're, sort of, in the mode where we -- we really
4 just have a limited presentations --

5 THE COURT: Well, you're relying on -- on the papers
6 so I think we're, kind of, at closing statements, frankly.

7 MR. HOGAN: We're really very close to closing
8 statements. I would propose first -- I would like to introduce
9 the witnesses from Delphi whose declarations are in evidence,
10 just so you know who they are.

11 THE COURT: Okay.

12 MR. HOGAN: And actually, I may have misspoke.
13 There's only one Delphi employee here but I'll introduce
14 Ms. Tina Weber first -- could you please stand up, Tina? She
15 is a -- with the Delphi's Power Train business line, a
16 purchasing manager. Jim Weber is a General Motors Corporation
17 program purchasing manager, employee of General Motors. And
18 Mr. Keith Frances (ph.) is a senior director of BBK limited;
19 he's our spokesman for damages.

20 THE COURT: Okay.

21 MR. HOGAN: So they're here, Judge, if you have any
22 questions of them. In terms of the closing discussion, I would
23 propose that since the claimant does have the burden of proof,
24 perhaps its appropriate for Mr. Schwartz to address the
25 Court --

1 THE COURT: Well before we get to --

2 MR. HOGAN: Certainly.

3 THE COURT: Are your witnesses here too, Mr.
4 Schwartz?

5 MR. SCHWARTZ: They are, Your Honor. Do you want me
6 to introduce them?

7 THE COURT: Yes.

8 MR. SCHWARTZ: This is John Cooper. He's the owner
9 of Nu-Tech. He's to my left. Ms. Trina Turner-Patrick who
10 worked for Delphi and Mr. Gary Lehman (ph.) who is the damage
11 expert.

12 THE COURT: Okay. All right. I -- as is every
13 judge, am somewhat tempted to ask questions but I actually
14 think that I'll respect the parties' decisions to rely on the
15 submissions that they've made, including the exhibits that
16 they've designated. I do that, primarily, because I think that
17 my questions, at best, just go around the edges and they're
18 more properly directed at counsel in pointing me to the
19 significance of various pieces of evidence or answering my
20 questions about the significance of various pieces of evidence.

21 So, I appreciate you're all coming in and don't want
22 you to feel like you made a wasted trip but having reviewed
23 everything again last night and briefly this morning a couple
24 of points, for the third time, I'm just going to go ahead and
25 ask you all to do closing argument. And I think Mr. Schwartz

1 should go first on that.

2 MR. HOGAN: Thank you, Judge.

3 MR. SCHWARTZ: Most of the salient facts, I don't
4 think, are in dispute in this claim, Judge. There's not a
5 dispute that there was a contract between Delphi and Nu-Tech.
6 That it was a requirements contract and that it was breached.

7 THE COURT: Well, there's a dispute as to when Delphi
8 Automotive Systems, LLC, entered into a contract.

9 MR. SCHWARTZ: You're right, Your Honor. They -- but
10 there is an acknowledgement that DAS signed the May 1999
11 purchase order.

12 THE COURT: Correct.

13 MR. SCHWARTZ: And you're getting -- that was
14 right -- you're leading into my first point which is, I think
15 the only issue with respect to that -- the only issue in
16 dispute between the parties on that is really the time frame.
17 There's no dispute between May 1999 and December 31, 2000
18 because that purchase order we agree on. There's a purchase
19 order that preceded it, in August of '98 that they claim was a
20 GM purchase order, we say it's a Delphi purchase order.

21 As I've indicated, Judge, this is Exhibit 16. These
22 are the reasons why I believe it's clear that Delphi is
23 responsible.

24 THE COURT: and when you say this, you mean which
25 purchase order?

1 MR. SCHWARTZ: This is the -- I'm sorry; this is the
2 August '98 purchase order that is in dispute.

3 THE COURT: Okay.

4 MR. SCHWARTZ: I think it's the only one that's in
5 dispute.

6 THE COURT: Okay.

7 MR. SCHWARTZ: If you look at the document itself,
8 Judge, it's on Delphi letterhead. The effective date is August
9 17 -- and this is where it says the line item is effective,
10 August 1, 1998 through July 31, 1999. Why that is significant,
11 Judge, is that if you look at Exhibit 17, which is the next
12 exhibit, that's the one that they concede is a Delphi purchase
13 order. And if you look at the same, the line item as
14 effective, it's the same date. This is Exhibit 17, August 1,
15 1998 through December 31, 2000.

16 So in the purchase order that they've admitted is
17 theirs, it was effective back to August of 1998, even if they
18 weren't in existence if you believe their theory.

19 THE COURT: Well, go to -- and I apologize. I was
20 working off your submissions, not these exhibit books. So --

21 MR. SCHWARTZ: Do you want me to ---

22 THE COURT: -- I'm not sure what number it is. It's
23 Exhibit E in the debtor's supplemental objection. It's the RPT
24 amendment.

25 MR. SCHWARTZ: The one that happened afterwards?

1 THE COURT: Yeah.

2 MR. SCHWARTZ: Yes. That is exhibit --

3 THE COURT: Is that 18?

4 MR. SCHWARTZ: 18.

5 THE COURT: Okay. That has the same language about
6 this line is effective from 1 August, 1998.

7 MR. SCHWARTZ: Correct.

8 THE COURT: So are you contending that the contract
9 with RPT went back to the orders from '98?

10 MR. SCHWARTZ: No, I'm saying it was a -- Delphi was
11 extending. And what they gave to RPT after RPT and Nu-Tech
12 entered into their transaction, was an extension put into RPT's
13 name.

14 THE COURT: But you're relying on this same language?

15 MR. SCHWARTZ: Yes, as far as the effective date.

16 Judge, I have evidence better than the document itself.

17 THE COURT: Okay.

18 MR. SCHWARTZ: I have an admission by Delphi's lawyer
19 that this is a Delphi contract.

20 THE COURT: Okay. Let's go to that because I was a
21 little confused by that too.

22 MR. SCHWARTZ: Okay. Look at Exhibit 28, Judge.
23 Exhibit 28 is Delphi's second amended answer to complaint in
24 the State Court. Do you -- would it be easier if I use my --
25 the submission that I sent you, because I have that also.

1 THE COURT: It would be because that's the one I
2 marked up. And I apologize for that but --

3 MR. SCHWARTZ: I'd rather we were on the same page.

4 THE COURT: Okay.

5 MR. SCHWARTZ: It is Exhibit P.

6 THE COURT: Okay.

7 MR. SCHWARTZ: Okay. If you go to paragraph 7, this
8 is their response -- Delphi's response to the lawsuit. And I'm
9 focusing on the last -- well, you can read the paragraph,
10 Judge.

11 THE COURT: Okay.

12 MR. SCHWARTZ: I'm focusing on the last sentence
13 which is the admission that the purchase orders, both the '98
14 and the May 1999, which they continue to acknowledge is theirs,
15 were Delphi's.

16 THE COURT: That's the sentence that says this
17 purchase order was amended by Delphi Automotive Systems?

18 MR. SCHWARTZ: Correct. Yes.

19 THE COURT: But Delphi Automotive Systems, LLC, is
20 defined as Delphi, not Delphi Automotive Systems. That's at
21 the very beginning of the complaint.

22 MR. SCHWARTZ: Yes.

23 THE COURT: So lawyers who are very careful when they
24 do answers, particularly when they're admitting items of
25 complaint, I think use defined terms when they -- when they

1 want -- when they're covering the term that they've defined.

2 MR. SCHWARTZ: I think a fair reading of this, Judge,
3 is whichever entity Delphi's counsel is referring to was the
4 same one. There's not a designation that --

5 THE COURT: Don't we all agree that before Delphi
6 Automotive Systems, LLC was formed and before any Delphi
7 Automotive Systems Corporation was formed, General Motors had a
8 division that it referred to as Delphi Automotive Systems?

9 MR. SCHWARTZ: It referred to it and Delphi
10 Automotive Systems did business --

11 THE COURT: And so --

12 MR. SCHWARTZ: -- conducted business and signed
13 contracts.

14 THE COURT: So it was a division of GM, not a
15 corporation.

16 MR. SCHWARTZ: Delphi Automotive Systems, the
17 defendant -- there's never -- again, until 2005 there was never
18 a suggestion -- I take that back. Until this claims
19 proceeding, there's never been a suggestion that the wrong
20 defendant was named. It was never raised in the State Court by
21 Delphi at any time, in answering the complaint or at any time
22 in the first three, four, five years -- three, four, five years
23 of the lawsuit if there was a suggestion that the wrong Delphi
24 was named in the complaint it would have been amended. And
25 that goes into the equitable estoppel; we're going to talk

1 about that.

2 THE COURT: Well, I'm sorry; it would have been
3 amended how?

4 MR. SCHWARTZ: The claim -- it would have been
5 amended -- it would have been amended to the name of the Delphi
6 entity that entered into this -- this contract.

7 THE COURT: But they're -- they're saying that no
8 Delphi entity entered into it as a separate legal entity as
9 opposed to a division of -- of GM.

10 MR. SCHWARTZ: And Judge, that's why I submitted to
11 you all the corporate documents, the filings with the SEC about
12 the business that Delphi was doing separately.

13 THE COURT: No, I understand that's a separate --

14 MR. SCHWARTZ: Prior --

15 THE COURT: -- that's a separate point. But on this
16 point I don't see -- I don't see a -- I guess I don't see a
17 basis for estoppel.

18 MR. SCHWARTZ: Okay.

19 THE COURT: I mean, I --

20 MR. SCHWARTZ: Judge, you have --

21 THE COURT: -- you can persuade me though. I'm
22 trying to --

23 MR. SCHWARTZ: I'll try. Ms. Patrick, who worked for
24 Delphi at the time and issued this says this was a Delphi
25 purchase order.

1 THE COURT: No, that's a separate point. I'm just
2 focusing on --

3 MR. SCHWARTZ: I'm trying to persuade you.

4 THE COURT: -- the fact that you're saying that
5 they've raised this new defense.

6 MR. SCHWARTZ: Well --

7 THE COURT: I mean, they certainly raised it in time
8 for you to allege that there was a different corporation but
9 that hasn't been done except -- except as you've done it here.
10 I mean, you have alleged -- you've disputed their allegation --

11 MR. SCHWARTZ: Yes.

12 THE COURT: -- that DAS LLC was formed in September.

13 MR. SCHWARTZ: Yes.

14 THE COURT: Okay. The two other points, and I'll try
15 to persuade you, Judge, one is you have Ms. Patrick's
16 affidavit, who worked for Delphi who issued this purchase order
17 and said this is a Delphi purchase order.

18 THE COURT: But she -- but in her depo -- she --
19 she's -- I mean, my impression, at least, from her -- her
20 affidavit is that she's not a lawyer. I mean, it -- how much
21 should I take away from her statement that she understands the
22 intricacies of what GM was going between 1998 and 1999 with
23 regard to setting up various Delphi Automotive entities and
24 doing this corporate spin-off and the like?

25 MR. SCHWARTZ: I don't --

1 THE COURT: I mean, her -- her boss was very candid
2 in her deposition and said I don't really know. I'm not a
3 lawyer. That's not part of my job.

4 MR. SCHWARTZ: And I -- and I would give you the same
5 answer for Ms. Patrick. However, she knows whose paying her.
6 She knows where she's working. She knows when she's issuing
7 new forms and new letterhead. And she said -- her testimony
8 is, this was Delphi. She's hear and you can question her
9 further if you'd like to.

10 THE COURT: Well, no but Delphi --

11 MR. SCHWARTZ: This was a Delphi purchase order.

12 THE COURT: But again -- but Delphi, again -- and I
13 appreciate that the name Delphi was around but just saying it's
14 Delphi doesn't establish that it was this legal entity or any
15 legal entity.

16 MR. SCHWARTZ: Okay. Let me try it from a different
17 approach.

18 THE COURT: Okay.

19 MR. SCHWARTZ: General Motors say, Delphi is
20 responsible for this purchase order.

21 THE COURT: Well that one I -- and this is -- I want
22 to focus in on that because although they say that in a -- in a
23 litigation letter, has anyone attached or is there -- it's
24 interesting we've gotten to this point in the case with me
25 asking this question, but that's because the debtors have

1 settled their disputes with GM, is there an acquisition or a
2 transition or spin-off agreement in the record --

3 MR. SCHWARTZ: There's not -- I'm sorry.

4 THE COURT: -- pursuant to which, you know, GM spun
5 off DAS LLC and in which the parties specified which
6 liabilities DAS LLC would be assuming and which it wouldn't be?
7 And which assets it would be getting and which assets it
8 wouldn't?

9 MR. SCHWARTZ: The answer to the question is, Judge,
10 it is not produced during discovery, that document, the master
11 separation agreement. It is specifically referred to in GM's
12 letter by paragraph of that agreement.

13 THE COURT: Well, but that's -- well, could we go to
14 the letter for a second?

15 MR. SCHWARTZ: Yeah. It's Exhibit H, Judge. And I'm
16 talking about the second -- the top of the second page.

17 THE COURT: Right. And he says that pursuant to
18 Section 2.01(a) of the Master Separation Agreement, Delphi
19 assumes certain purchase orders including, but not limited to,
20 the purchase order giving rise to Nu-Tech's claims to Delphi,
21 effective January 1, 1999.

22 MR. SCHWARTZ: Yes.

23 THE COURT: But -- I mean, is there anything to
24 corroborate -- I mean, is there anything to corroborate that?

25 MR. SCHWARTZ: There's nothing to dispute it. I

1 don't have the agreement. It wasn't produced during discovery
2 and they've offered nothing --

3 THE COURT: Well, was it asked for?

4 MR. SCHWARTZ: The documents relating to the -- the
5 spin-off was and we got a general objection. I will -- I did
6 not pursue it further, which I know was my right with you,
7 Judge, to do. But there is nothing contradicting that.

8 THE COURT: Okay.

9 MR. SCHWARTZ: And the last point, and I know I made
10 it in my brief, Judge, is that the position they're taking --
11 that Delphi is taking that it was not until the LLC was formed,
12 the whole spin-off ended, that occurred after the May 1999
13 purchase order which they are acknowledging.

14 THE COURT: '99?

15 MR. SCHWARTZ: '99, correct. Which they're
16 acknowledging was theirs.

17 THE COURT: Right. No, I -- I think --

18 MR. SCHWARTZ: It's an inconsistency --

19 THE COURT: I think that -- I'll ask Mr. Hogan this,
20 but it seems to me that the -- pointing to the date of the
21 spin-off is irrelevant if -- if there was a live entity, a live
22 legal entity DAS, LLC, that entered into a contract, the '99
23 purchase order, then it really doesn't matter when it was spun-
24 off, it was a -- it had a separate corporative existence
25 unless, for some reason, the entity with a different name was

1 the one that was -- that you're suing now but that's not
2 alleged, I don't think. I'm sorry, the same -- a different
3 entity with the same name is the debtor now and they're not
4 asserting that. So I -- and I don't think they're disputing
5 that the -- the -- that the purchase order that's May 3, 1999,
6 is a binding contract on DAS, LLC. I don't think they're
7 disputing that. So I think the date of the spin-off is pretty
8 much relevant. It's when the entity existed unless, as you
9 say, that entity, DAS, LLC, assumed GM's obligations under the
10 prior purchase orders, the August one.

11 MR. SCHWARTZ: The other thing, Judge --

12 THE COURT: August '98. Could I -- could I ask you,
13 is there anything in the record with -- because I think you
14 also suggest, in various ways, that DAS, LLC, impliedly assumed
15 GM's obligations under the August '98 order. Is there anything
16 in the record to show that DAS, LLC, paid obligations arising
17 before May 3, 1999?

18 MR. SCHWARTZ: Let me see. I was just -- I was going
19 to point to you, at least -- if you look at the Cooper
20 affidavit -- declaration?

21 THE COURT: Uh-huh.

22 MR. SCHWARTZ: Exhibit 5, although it's not a -- it's
23 not a check it's a Delphi Automotive Systems letter, which I
24 will tell you does not say LLC after it but it's from their
25 director of purchasing to Mr. Maley from Delphi.

1 THE COURT: Well, that's just a thank you letter,
2 right?

3 MR. SCHWARTZ: It is but it's not a G -- and then if
4 you look at the very next exhibit, that's the GM letter with
5 the same type of thank you from the GM person, at the same time
6 for settling -- for helping to settle the same strike.

7 THE COURT: Okay. But again, just going to my
8 question about --

9 MR. SCHWARTZ: I'm looking for payment, Judge. I
10 apologize.

11 THE COURT: Okay.

12 MR. SCHWARTZ: Judge, we have -- and this is a
13 different Delphi entity, it's Exhibit 12. It's Delphi Engine -
14 - Energy and Engine Management System talking about payments on
15 December of '98.

16 THE COURT: Okay.

17 MR. SCHWARTZ: And this -- this is to the Patrick
18 affidavit.

19 THE COURT: Well, would I --

20 MR. SCHWARTZ: But I do not have a check.

21 THE COURT: Okay. All right. Okay.

22 MR. SCHWARTZ: Any other questions, at least, on the
23 that issue?

24 THE COURT: No, I don't think so.

25 MR. SCHWARTZ: All right. It is our belief, because

1 of that evidence, that the relevant time frame for damage
2 purposes is January 1, 1999, not May 1, 1999, that's what all
3 that issue goes towards.

4 The second issue that has been raised, or the second
5 defense that's been raised, is does Nu-Tech possess the claim.
6 And I would submit to Your Honor the only way that Nu-Tech
7 doesn't possess the claim is that the debtor would have to get
8 over three hurdles to establish that.

9 First, you'd have to look at the transaction between
10 Nu-Tech and RPT. And I know we've -- both sides briefed this.
11 This is Exhibits -- I'm sorry. I hold the exhibits in the --
12 it's Exhibit 20 and 21 but there is some language I wanted to
13 look at. Let me find the letters for you.

14 THE COURT: I have them.

15 MR. SCHWARTZ: Do you have them?

16 THE COURT: Yeah.

17 MR. SCHWARTZ: Okay. Before I talk about it, Judge,
18 because I think this is significant to one of the points that
19 Delphi raises in their argument, and it goes to damages when
20 there's a breach of a contract, especially installment contract
21 or requirements contract like we have here. Under Michigan
22 law, Blazer Foods v Restaurant Properties, 259 Mich at 241,
23 2003 and H.J. Tucker v Chalmers, 234, Mich at 550, 1999, both
24 of those cases say that when a party breaches a contract,
25 materially, the non-breaching party has two choices. They can

1 terminate the contract and sue for damages or they can continue
2 to perform and sue for partial damages.

3 What happened here when this requirements contract
4 was not being filled, and we know from the record Nu-Tech
5 believed they were going to get the part or get a replacement
6 part and that's why they continued trying to work Delphi, who
7 actually got them to the position that they were in as of the
8 time the tools were taken. They did not -- they never -- Nu-
9 Tech never terminated the contract. They continued to be
10 ready, willing and able to perform under the contract.

11 I think a fair reading of both the memorandum and
12 then the supplement asset purchase agreement; because they are
13 one integrated document the way they're written.

14 THE COURT: I don't understand how that can be. I
15 understand it says that they are -- it doesn't really say
16 they're one integrated document.

17 MR. SCHWARTZ: It says one supplements the other.

18 THE COURT: Right. And so If one is different from
19 the other, the later one governs, which is defined as
20 definitive, right?

21 MR. SCHWARTZ: I disagree with you, Judge. Because
22 of the language in the integration clause in the latter
23 agreement, which doesn't say it supercedes the prior one.

24 THE COURT: But it's not -- well, let's go -- why
25 don't we go to that language.

1 MR. SCHWARTZ: Do you have those pulled out or do you
2 want me to get the letters?

3 THE COURT: No, I have them.

4 MR. SCHWARTZ: Okay. They're Exhibit 20 and 21 in
5 the record at this point.

6 THE COURT: All right.

7 MR. SCHWARTZ: Exhibit 21, the integration clause,
8 which is paragraph 17.4.

9 THE COURT: Right.

10 MR. SCHWARTZ: It indicates -- it specifically refers
11 to the memo and it indicates that this agreement is going to
12 supplement it and complete it. It doesn't say it's going to
13 supercede it or it doesn't have language like you typically see
14 that where inconsistent this latter agreement will govern. It
15 doesn't say that.

16 THE COURT: Right but if it is different than the
17 prior document, which is --

18 MR. SCHWARTZ: It's 20 in the exhibits now.

19 THE COURT: Right. Which is the memorandum and
20 agreement and, in fact, that's defined as the memo in -- in
21 recital A in the final agreement, the one that's marked final.
22 And it says the purpose of this agreement is to supplement and
23 complete the terms and conditions of the memo in a definitive
24 fashion. If -- if the memo lists, for example, a description
25 of the purchase assets in a way that's different then the

1 definitive agreement or the final agreement, you would have to
2 assume, wouldn't you, that the final agreement is the one that
3 completes the earlier asset -- the earlier one.

4 MR. SCHWARTZ: I think, because of the language the
5 parties chose, no.

6 THE COURT: Okay.

7 MR. SCHWARTZ: Logically, I agree with you, Judge.
8 But that's not the language the parties of the contract chose
9 to use.

10 THE COURT: Okay.

11 MR. SCHWARTZ: And it is a confusing agreement, I
12 agree with you. But I think the structure of the agreement,
13 Judge, either the memo which is more abbreviated or the
14 agreement of purchase and sale of business assets, but I think
15 it relates to an issue that Delphi has raised, was that RPT was
16 going to take over the business operations, the business
17 assets, and move forward after the closing in 2000. That what
18 Nu-Tech was trying to keep was things that were theirs up until
19 the time of closing. So when you look at excluded assets, at
20 least the categories of what they were trying to keep, cash,
21 accounts receivable, pre-paid items, refunds, those are the
22 types of items, in general, they were trying to keep.

23 The causes of action that they would have for
24 breaching the purchase order up till that point was Nu-Techs.
25 It's a general intangible.

1 THE COURT: Well --

2 MR. SCHWARTZ: RPT --

3 THE COURT: -- isn't the -- isn't the contract for
4 the pump used and useful in the business? I mean, Mr. Cooper's
5 testimony -- the contract for the -- was it 06 --

6 MR. SCHWARTZ: 0694.

7 THE COURT: -- he testifies that's, like, the
8 foundation of his business.

9 MR. SCHWARTZ: It was the foundation of his business,
10 that's why it went under.

11 THE COURT: And it ran through, and was not
12 terminated, it ran through 2000.

13 MR. SCHWARTZ: Correct.

14 THE COURT: December 21, 2000, the date of this
15 agreement is --

16 MR. SCHWARTZ: January 14, 2000 is the second one.

17 THE COURT: -- although, if you rely on the
18 integration it's effective on December 1, 1999.

19 MR. SCHWARTZ: I agree.

20 THE COURT: And it would be hard to see anything more
21 used in connection with the business then that contract.

22 MR. SCHWARTZ: That wasn't the only asset that was
23 sold, Judge.

24 THE COURT: Oh, I know. But it certainly was an
25 important one.

1 MR. SCHWARTZ: It was the -- it was the -- it was the
2 foundation the business was built upon. But there was other
3 tools, there was other parts --

4 THE COURT: But I -- I'm not disagreeing with that.

5 MR. SCHWARTZ: Okay.

6 THE COURT: Okay. I'm just looking at the definition
7 of purchased assets --

8 MR. SCHWARTZ: Okay.

9 THE COURT: -- in the memorandum and agreement.

10 MR. SCHWARTZ: Okay.

11 THE COURT: Which says that purchaser shall purchase
12 all seller's assets, except excluded assets, existing or used
13 in connection with -- in connection with the business. To me
14 that says they purchased the contract.

15 MR. SCHWARTZ: It -- they did not purchase the cause
16 of action.

17 THE COURT: But if you purchase a contract, you don't
18 think you purchase the right to sue for breach?

19 MR. SCHWARTZ: That's the cases I just cited, Judge.
20 That's why there's a distinction between what you choose to do
21 with your legal rights. So no, I disagree with that.

22 THE COURT: Go back to the case you cited, I missed
23 that.

24 THE COURT: Blazer Foods v Restaurant Properties,
25 H.A. Chalker v. Chalmer's. Each time you don't fulfill the

1 contract -- the contract continues. You can choose to continue
2 it, you can choose to terminate.

3 THE COURT: Right.

4 MR. SCHWARTZ: Each time you choose is a separate
5 breach of that contract. RPT, when they entered into this
6 transaction, new what had happened with part 0694, they knew it
7 wasn't there. It hadn't been there for a year. That's why
8 Nu-Tech was in the financial straights that it was. It had the
9 rights to continue on with the contract, if they would have
10 brought any parts but the cause of action, which when you sell
11 a business is a general intangible, it's not a hard asset, and
12 if you -- and the definition gets even clearer, I think, in the
13 second agreement to a degree --

14 THE COURT: Okay.

15 MR. SCHWARTZ: -- when it starts listing categories.
16 You have a broad statement that everything's being transferred.
17 And then you have an equally broad exclusion -- excluded asset
18 section, 1.4(d) that everything's excluded unless specifically
19 or by inference in the paragraphs or the exhibits. And there
20 is no reference to the causes of action being transferred.

21 THE COURT: Well, let me -- let me make sure I
22 understand your point you made just before that, then. So
23 you're saying that even though RPT bought the contract and I'm
24 going to say, had, under this definition by inference, the
25 right to enforce the contract going forward, nevertheless, Nu-

1 Tech had the right to sue for damages going forward?

2 THE COURT: No, up to the point of the transfer.

3 THE COURT: Up to the point of the transfer.

4 MR. SCHWARTZ: Correct.

5 THE COURT: Okay.

6 MR. SCHWARTZ: It's no different than, I believe -- I
7 analogize it to the other things that were listed, pre-paid
8 items, tax refunds that you're entitled to, accounts
9 receivable, work you've -- things that are yours that have
10 value up to that point, Nu-Tech was keeping. That's what the
11 excluded -- that's what the first three paragraphs under
12 excluded assets talk about.

13 THE COURT: Okay.

14 MR. SCHWARTZ: So, I believe, because the general
15 intangible -- I believe if you look at the excluded language
16 broadly, it eliminates general intangibles that Nu-Tech kept
17 the claim. If you believe that there's a conflict, that the
18 two provisions conflict with one another, then you have an
19 ambiguity in the contract and you've got evidence from both
20 parties to the transaction, Nu-Tech and RPT, that there was
21 never an intent, it was never part of the transaction to sell
22 the cause of action. The only one -- the only party that's
23 alleging that it was sold is Delphi. And it's an issue they've
24 raised late in the game, which is my third part that I'll get
25 to.

1 Do you have any other questions of me on the
2 contracts, Judge?

3 THE COURT: No, that's fine.

4 MR. SCHWARTZ: Can I add one point, only because it
5 came up in their brief and since this is closing argument?
6 There was a suggestion -- they cited to the Michigan UCC
7 statute, 450.2210, that somehow that should answer the question
8 we're dealing with. But what they didn't cite you to was
9 subsections 4 and subsections 5 which both they, this is the
10 general rule unless the circumstances indicate to the contrary
11 which they do here because we have a signed agreement that
12 deals with these issues. So the contracts are what has to be
13 interpreted. It's not going to be governed by the general
14 provision the MCLI that they cited to. That's the only other
15 thing -- point that I had on that.

16 THE COURT: Okay.

17 MR. SCHWARTZ: Okay. So I believe Nu-Tech has always
18 had the claim. That's hurdle one that Delphi has to get over.
19 Hurdle number two is that in the event Nu-Tech didn't have the
20 claim, it was assigned back to them during the pendency of the
21 litigation. The -- Delphi didn't raise this issue until three
22 years into the litigation. When they did, Nu-Tech -- and
23 that's when they got the motion for summary disposition. Nu-
24 Tech immediately talked to RPT. They signed the
25 acknowledgement and they signed back to Nu-Tech the right to

1 sue. And therefore they continue to be -- they continue to be
2 the party pursuing the action.

3 This was the -- the claim that was litigated in front
4 of the Trial Court below. I agree with Delphi that you're not
5 bound to follow that judge's decision, although that was the
6 judge that dealt with this litigation for years, knew that the
7 parties had been litigating this, that Delphi had been aware of
8 the claims from the beginning, discovery was over when this
9 issue first arose and that judge denied it. But I'm not
10 suggesting that you are bound by it. I just think you should -
11 -

12 THE COURT: And it's fair to say --

13 MR. SCHWARTZ: -- use your discretion.

14 THE COURT: -- he wasn't given the issue in the
15 context of a statute of limitations issue.

16 MR. SCHWARTZ: That's correct. That was another new
17 one for this Court.

18 THE COURT: Okay.

19 MR. SCHWARTZ: The cases that Delphi cites, they cite
20 you to two unpublished, non-precedential cases, for you to
21 reach this decision. I said it to you, the Oakstra (ph.) case
22 with the tolling statute. That if you file another lawsuit,
23 even in Oakstra it was filed in the wrong state. It was
24 pending for a period of time. And then when it came back to
25 Michigan the statute still told, even though the first court

1 never had jurisdiction over it.

2 THE COURT: But that was a proper plaintiff from the
3 start.

4 MR. SCHWARTZ: Wrong court, right plaintiff. I agree
5 with you. I would cite to other cases, Judge, and again I'm
6 raising this because they brought up a new case in their brief
7 that isn't in my brief. But in both cases these were the wrong
8 plaintiffs from the start. The statute ran and they corrected
9 the situation and the court refused to deny, on the statute of
10 limitations grounds, this is Salt Marsh v Bernard, 151 MICH HAP
11 476. The second one is Wieczorek, W-I-E-C-Z-O-R-E-K, v
12 Volkswagon Werk, and Werk is W-E-R-K, 731 F.2d., 304. It's a
13 Sixth Circuit Michigan case in 1984. And both of those cases
14 were --

15 THE COURT: I'm sorry. 731 F.2nd?

16 MR. SCHWARTZ: Yes, 309. One was a legal malpractice
17 case, Judge, the Salt Marsh case. The second one was an auto
18 accident case. And in both of those cases the plaintiff filed
19 a suit not on behalf of the estate, someone had died, and just
20 went in their own name and filed it -- filed a lawsuit. The
21 plaintiff didn't have standing to bring the claim. The
22 defendant filed a motion for summary -- statute of limitations
23 expired. The plaintiff went to the Probate Court in Michigan,
24 corrected the situation and in front of the judge said this was
25 an innocent mistake, we've been litigating the case and the

1 court, in both those situations, allowed the claims to
2 continue. They didn't talk about tolling. But the language,
3 and I think it's relevant to this situation, Judge, this is at
4 491 of the Salt Marsh case; justice is best served by
5 precluding the avoidance of a valid claim, such as the one
6 here, by a legal technicality which does not prejudice the
7 defendant provided the plaintiff acted in good faith in their
8 belief when they filed the suit, which is what happened here.

9 So, you've got published cases that show you what
10 Michigan does. Delphi doesn't cite you to any published case
11 that distinguishes the tolling statute. They cite you to a
12 Supreme Court case that says tolling won't apply -- which --
13 and that is a published case, but it didn't deal with tolling
14 at all. The question in that case was, the statute of
15 limitations runs and you want to -- there's a misnomer in the
16 party name, like we were talking about earlier with Delphi, if
17 we named the wrong Delphi and there was another Delphi entity
18 that should have been named. In Michigan you can correct the
19 misnomer.

20 In that case, the Supreme Court said that you
21 wouldn't be correcting a misnomer, it was a trustee in
22 bankruptcy that should have been pursuing the claim, not the
23 individual. And to add the trustee after the statute of
24 limitations ran out is adding a new party. When you add a new
25 party, if the statute's run out, under the Michigan court rules

1 it doesn't relate back. And therefore, the Court didn't allow
2 that to happen. And that's a non-tolling case. That's the
3 only published case that they've cited to you.

4 So that's hurdle number two that Delphi has to get
5 over. And third, Judge, and I think this is most applicable
6 because of what's happened in this litigation, is I want to
7 talk to you about equitable estoppel.

8 Assuming Nu-Tech did sell the claim and while that
9 lawsuit was pending and the assignment came back to Nu-Tech,
10 the statute of limitations had run out, the doctrine of
11 equitable estoppel should stop them from raising it. And I
12 cited to you the Penny case in my brief. But what it says is,
13 a party by it's representations, admissions or silence,
14 intentionally or negligently induces another party to believe
15 certain facts, the other party must not only have justifiably
16 relied on the belief but must also -- but also be subject to
17 prejudice if the party's permitted to deny the facts upon which
18 the second party relied. That's the Penny case that I cited to
19 you.

20 In Penny, because it's a little bit similar to this
21 case, it was a product liability case, many defendants were
22 listed. One of the defendants participated in discussions with
23 the cases involved in part of litigating the case, but the
24 plaintiff had never properly served them. He sat silent. He
25 participated in the litigation. The case got -- the summons

1 expired. The case got dismissed against him and that's where
2 the court, the Michigan court said, when he was participating,
3 involved in the litigation and he didn't step forward and say
4 something when he knew there was a defect that could have been
5 corrected, because he had gotten a copy of the dismissal order
6 and didn't notify claims counsel on it, when plaintiff's
7 counsel still could have corrected it before the statute ran.

8 THE COURT: Have you looked at Barret Camp 33, Inc.
9 v Corporate Design Group, Inc. --

10 MR. SCHWARTZ: No.

11 THE COURT: -- (1999) Mich App, Lexis 759?

12 MR. SCHWARTZ: I have not, Judge, but I wanted to go
13 through, factually, what happened here. And I will cite you
14 one other -- and I'm happy to talk about the case I just -- I
15 don't know it.

16 THE COURT: Okay.

17 MR. SCHWARTZ: Judge, this is the chronology. Nu-
18 Tech files its lawsuit on December 30th, '02. Delphi answers
19 it March 14th, '03. Doesn't say a word about standing or real
20 party in interest. They amend their answer September 24th,
21 '03, don't say a word about lack of standing or real party in
22 interest.

23 It's not until the second amended complaint -- the
24 second amended answer to the complaint which was filed
25 12/20/04, is the first time they raised the issue. They filed

1 that amended answer and affirmative defenses. All they say is
2 lack of standing. They don't say why but that is in the
3 affirmative defenses. At that point Nu-Tech's promissory
4 estoppel claim is gone. And under the cases I talked to you
5 about earlier about breach of contract, there's a breach every
6 day that goes by, all of their breach -- Nu-Tech's breach of
7 contract claims are gone except for the last ten days, because
8 there's a four year period of time that at that point to
9 settle.

10 The ConAgra v Farmer State Bank case, 237 Mich App
11 109, (1999) says, silence can form the basis of equitable
12 estoppel when the silent party had a duty or obligation to
13 speak.

14 THE COURT: But why -- why is there a duty and an
15 obligation to speak on a defendant's part? I'm going to read
16 you the quote from this case I just cited you.

17 MR. SCHWARTZ: Okay.

18 THE COURT: There is also no merit to Barrett's
19 claim, that was the plaintiff, that it was prejudiced by the
20 length of time between the filing of its complaint and
21 defendant's summary disposition motion. In this regard Barrett
22 has not made any showing of prejudice arising from the delay.
23 Further, there is no merit to Barrett's contention that the
24 doctrine of laches should bar defendants from seeking summary
25 disposition on the basis of lack of standing. He cites

1 Torakis v Torakis, 194 Mich App 201.

2 Moreover, although Barrett puts forth a theory that
3 estopple by silence bars defendants from seeking dismissal of
4 this case on the ground of lack of standing, Commercial Union
5 Insurance v. Medical Protective Company, it gives the cite,
6 does not support plaintiff's contention. As defendants
7 correctly observe, they were under no affirmative duty to
8 advise or assist Barrett or its counsel in drafting pleadings
9 that would withstand dispositive motions. Indeed, counsel for
10 defendants have an ethical obligation to represent their
11 clients with zeal. This obligation would be undermined were we
12 to hold that defense counsel should assist plaintiff's counsel
13 regarding proper pleading.

14 MR. SCHWARTZ: The answer to your question, Judge, is
15 Delphi was under an obligation, under the Michigan court rules,
16 when they filed their answer to the complaint. MCR 2.11(f)(3)
17 Affirmative Defenses. Affirmative defenses must be stated in a
18 party's responsive pleading either as originally filed or as
19 amended in accordance with MCR 2.118. Under a separate and
20 distinct heading, a party must state the facts constituted, and
21 then it lists the laundry lists of the statute of limitations,
22 statute of frauds. But now I'm going to go to subsection B.

23 THE COURT: All right, now, I'm sorry. This is
24 2.113?

25 MR. SCHWARTZ: 2.111 --

1 THE COURT: 111, okay.

2 MR. SCHWARTZ: F, subparagraph 3. I read you the
3 introduction.

4 THE COURT: I'm sorry, F(3)? F(3), okay.

5 MR. SCHWARTZ: F, as in Frank.

6 THE COURT: Okay.

7 MR. SCHWARTZ: And then 3, talks about affirmative
8 defenses. This is pleading requirements.

9 THE COURT: Okay.

10 MR. SCHWARTZ: 3(b) says, this is what they have to
11 do; A defense that by reason of other affirmative defense seeks
12 to avoid the legal effect or defeat the claim of the opposing
13 party in whole or in part. C talks about a ground of defense
14 that if not raised in the pleading would be likely to take the
15 adverse party by surprise. Those are -- that's their
16 obligation to raise. MCR 2.112, this is pleading special
17 matters, under subparagraph A, subparagraph 2, a party wishing
18 to raise an issue about B, the capacity of a party to sue or be
19 sued, C, the authority of a party to sue or be sued in a
20 representative capacity, must do so by specific allegations,
21 including supporting facts peculiarly within the pleaders
22 knowledge.

23 Those are obligations they had when the complaint was
24 filed. They were aware of the Nu-Tech, RPT transaction.
25 Nothing happened all of a sudden in '04 for them to become

1 aware of it. BBK, their agent, helped broker that deal. So
2 they didn't raise it timely the way the court rules require.
3 Their silence prejudiced Nu-Tech because by the time they do
4 raise it the statute of limitations is gone as to one claim and
5 all but gone as to the other. And there can be no doubt what
6 happened because you saw what happened -- what Nu-Tech did when
7 this got raised is, they immediately went to RPT and got the --
8 got the acknowledgment that the transaction -- the cause of
9 action wasn't assigned. And in the event that it was, it was
10 assigned back. They would have done the same thing back in '02
11 or '03 or earlier in '04 had it been raised timely. It was
12 something thought up after the fact, after discovery was over,
13 when the case was on the verge of trial. And this is the
14 perfect situation for equitable estoppel.

15 The only other case that I'd cite, Judge, that I
16 think is somewhat applicable, it rises out of Michigan, in re
17 Kent Holland Dye Casting, 922, F.2d., 342. It's a Sixth
18 Circuit Michigan case, 1999 -- 1991.

19 So for all of those hurdles, Judge, I don't think --
20 I think the Nu-Tech is the proper party here.

21 The last thing that I want to address, Judge, is
22 damages.

23 THE COURT: I'm sorry, is damages?

24 MR. SCHWARTZ: The last thing I want to address is
25 damages.

1 THE COURT: Okay.

2 MR. SCHWARTZ: Nu-Tech hired, you know, Gary Lehman
3 as it's damage expert. I've given you the report. It's
4 detailed. The analysis is there and I'll answer questions if
5 you have any or Mr. Lehman is here. But it -- I contrasted
6 that with Mr. Frances' supplemental declaration which I
7 recently saw because the numbers were so different.

8 And I think you should be comparing apples to apples,
9 and when you look at numbers you'll see why. Because it's
10 clear Mr. Francis, number one, he's a fact witness. He worked
11 out at Nu-Tech when BBK came -- got involved. He's not an
12 independent expert that was hired, which under the accounting
13 ethic rules, I think, he shouldn't be giving expert testimony.
14 He didn't conduct his own analysis. He took Mr. Lehman's and
15 then gave some criticisms. He's not -- from what I can look at
16 his qualifications, he's a CPA. I mean, he looks like he's
17 very good at what he does with helping turn around businesses.
18 But I'm not sure that he's qualified to give business valuation
19 analysis. I didn't see it on his CV.

20 But looking at the two, what -- if you look at --
21 looking at Exhibit number 3, I want to talk about the lost
22 income. And we'll look at 1999, the first year. Lehman went
23 through his whole analysis. He figured variable costs, fixed
24 costs, what the gross sale should have been under the
25 requirements contract. And he came up with damages in 1999,

1 Judge, of 4,446,213.

2 If you look at Mr. Francis' Exhibit 3, he says,
3 before taxes, the number should be 2,144,280. There's a big
4 discrepancy between the two. And looking at the discrepancy,
5 Judge, first of all Mr. Francis as a general and he criticized
6 Mr. Lehman of including division two expense in his analysis.
7 And Mr. Lehman has given a supplemental declaration that that
8 did not occur and he walked through how he calculated things.
9 Mr. Francis also provided to this Court an affidavit showing
10 after tax profits for Nu-Tech's damages, and that's not a
11 proper measure of damages. Nu-Tech is awarded anything in a
12 lawsuit, they've got to pay tax on the recovery, depending on
13 the circumstances, but certainly here because these are lost
14 profits. So, Mr. Francis' bottom line conclusions after tax I
15 don't think are appropriate so I looked back at his schedule.
16 He -- he showed, pre-tax, 2,144,280 for 1999.

17 The difference between his number and Mr. Lehman's --
18 there's two differences. The first difference is how many
19 units were sold. And as I indicated to the -- well, the
20 difference between the two is 500,000 units, which accounts for
21 over a million dollars of damage between -- the difference
22 between Lehman and Francis.

23 Exhibit 27 in the exhibit book, and there is an
24 exhibit, Judge and if you've read it I won't waste time looking
25 at it. But there's an exhibit that I attached to my summary

1 which showed the efforts in the trial court that we went
2 through to try to find out how many units were sold during 1999
3 and 2000 because that -- you have to know that to calculate the
4 profit loss. It was not produced in the State Court. This is
5 Exhibit S, Judge. We asked at interrogatories, we asked it in
6 letters and we were constantly told that Delphi and GM didn't
7 have that number for us.

8 So Mr. Lehman did the next best thing he could. He
9 went to an authoritative source as to the GM cars that were
10 sold in 1999, published statistics, they used this part. Mr.
11 Francis was deposed, and again his number is 500,000. During
12 this proceeding a Mr. Weber, one of their other witnesses,
13 provided a report, a day care -- a Day Core report, a thick
14 report. And that was a report showing what GM paid outside
15 people for assemblies that had this part. And he, I think,
16 testified honestly. That's what I was asked to do and that's
17 what I did.

18 The problem with the Day Core report is, it doesn't
19 account for all the parts that were manufactured. Only the
20 ones that went into an assembly that GM bought. Anything that
21 GM did in-house with the part wouldn't be in that number.
22 There is a different way to compute it, Mr. Weber explained.
23 There's a program they have called Global Product Description
24 System. I think it's Mr. Lehman's declaration. He's familiar
25 with it. When you have recalls, they have the data to tell you

1 how many parts and who has got the parts.

2 Well, Mr. Francis was asked for the volume of parts
3 you used to come up with your profit loss, did you use the Day
4 Core report? He said no.

5 THE COURT: Well, when you say they have the data who
6 are you referring to when you say they?

7 MR. SCHWARTZ: Delphi. If Delphi doesn't GM does.

8 THE COURT: Well, that's a distinction though, right?
9 Delphi doesn't control GM.

10 MR. SCHWARTZ: It is a distinction. It is but the --
11 Mr. Lippard (ph.) represented both GM and Delphi in the lawsuit
12 up until this bankruptcy pleading was filed. And he was asked,
13 specifically --

14 THE COURT: But you've been referring to things since
15 then.

16 MR. SCHWARTZ: Okay. What I'm referring to since then
17 is that Delphi has produced a witness from General Motors, Mr.
18 Weber, who went into their system. And what I'm suggesting is,
19 there was another way he could have given us a completely
20 accurate --

21 THE COURT: But I don't -- you haven't made a motion
22 to exclude this evidence. In fact, it's been admitted. I'm
23 not quite sure where you're going with this.

24 MR. SCHWARTZ: I'm trying to show -- I'm trying to
25 explain to you where the differences are.

1 THE COURT: Well, no, you're doing more than that.
2 You're trying to say that they hid the ball from you and that
3 therefore I shouldn't consider the evidence of what GM
4 submitted.

5 MR. SCHWARTZ: That's not what I'm suggesting, Judge.

6 THE COURT: Okay.

7 MR. SCHWARTZ: I'm talking about the weight to give
8 the difference between Lehman's analysis and Delphi's
9 analysis --

10 THE COURT: Okay.

11 MR. SCHWARTZ: -- Mr. Francis. That's what I'm
12 suggesting. I'm not suggesting to ignore Francis completely.

13 THE COURT: All right. But what's the basis to
14 dispute the data that GM provided the debtors and that's in the
15 exhibit?

16 MR. SCHWARTZ: GM -- the data that you saw was what
17 GM purchased from Delphi for the part. It's not all the
18 requirements for the part.

19 THE COURT: Well, is there any evidence that they --
20 that there was any other production?

21 MR. SCHWARTZ: I believe, in the cross examination
22 that we presented to you, from Mr. Weber, that there was a way,
23 using this other system, to track every part that was
24 manufactured. I believe that's in the designations.

25 THE COURT: But is -- that -- but is there anything

1 to suggest that there was any other production besides by
2 Delphi of the part?

3 MR. SCHWARTZ: There's nothing in the record.
4 Logically, you have after-market parts. You have parts that
5 are needed by dealers but there's nothing in the record, Judge.
6 And this is closing argument, you're right.

7 THE COURT: Okay.

8 MR. SCHWARTZ: Assume that the Day Core report is
9 right, Judge, Mr. Francis acknowledges he didn't use it in
10 coming up with his number. He testified he was given a
11 spreadsheet to come up with his number. His spreadsheet isn't
12 attached to his report. So, part of the difference between
13 Lehman's 4.4 million and Francis' 2.1 million is the units.
14 And I'm just point out on the record, Judge; it is the units
15 that is the issue. I don't suggest that if the units are less
16 than what Mr. Lehman used that our damages shouldn't be less.
17 It should be what the units are. But this is the evidence that
18 you have in front of you.

19 The second reason for the difference, one was the
20 unit the second is, if you look closely at Mr. Francis'
21 analysis, he attributes all of the labor, all of the overhead
22 that Nu-Tech was incurring, to Delphi -- to this part. There's
23 testimony on the record they had something called Division Two,
24 they had tools. Mr. Lehman went through and broke that out to
25 come up with his labor amount. He figured out labor as a cost

1 of the total sales and labor as a cost of these smaller --
2 there's -- it's a smaller number. But again, the difference is
3 Mr. Francis lumped all of the labor costs to the Delphi sales
4 which is going to lower profit and is going to lower the
5 numbers. Those are really the only -- the two factors as to
6 why there's such a big discrepancy for 1999 lost income.

7 And the same thing for 2000 lost income. Again, now
8 the numbers -- the difference in units went from 500,000 to a
9 million, five. Different units between Lehman and Francis
10 which came up with a significantly different number for 2000.

11 The second part of the analysis, Judge, and I know --

12 THE COURT: Before you go on to the second part --

13 MR. SCHWARTZ: Yes.

14 THE COURT: You went, fairly quickly, over Francis'
15 point about taxes.

16 MR. SCHWARTZ: Yes.

17 THE COURT: Can you go over that point of your again?

18 MR. SCHWARTZ: Yes. Mr. Francis, in giving -- the
19 reply brief that we got from Delphi, I think they said that the
20 damages, at most, should be 750,000 dollars because they're --
21 they're using the May 31 period till the end of the year. But
22 they say it should be 750. That's an after tax number. He was
23 asked at his deposition why are you using the after tax? If
24 the new check is awarded that they have to pay tax on, he
25 didn't have an explanation for it.

1 So the numbers they're giving you is -- even if you
2 believe his number completely, that's your ruling, his number
3 isn't accurate. It has to be a before tax number.

4 THE COURT: Because?

5 MR. SCHWARTZ: Because if there's an award to Nu-
6 Tech, at least this was at trial court, Nu-Tech was awarded the
7 amount. The jury or the judge is a total -- figure out the
8 amount Nu-Tech is awarded and then deduct taxes for them. Nu-
9 Tech was awarded it, they 1099'd the money. They pay tax at
10 the end of the year. There's no reason for it to be after tax.

11 THE COURT: Well, he -- he wasn't applying taxes to -
12 - he didn't come up with a gross number and then -- and then
13 reduce it for taxes --

14 MR. SCHWARTZ: Yes, he did.

15 THE COURT: -- on that number, right?

16 MR. SCHWARTZ: Yes, he did.

17 THE COURT: He did it for what Nu-Tech would have
18 paid on -- on the taxes, right?

19 MR. SCHWARTZ: No, no. The numbers that he gave you
20 in his brief, the 750, is after tax, an after tax number. He
21 criticizes Mr. Lehman about taxes and I'm comfortable with
22 Mr. Lehman's analysis. He says he though Mr. Lehman handled
23 the taxes differently, which Mr. Lehman denies. And if you go
24 through his declaration he didn't. He thought he used taxes
25 differently when doing his lost profit versus the way he did

1 with his business valuation, which didn't occur.

2 THE COURT: Okay.

3 MR. SCHWARTZ: So that's -- with respect to lost
4 income that's -- those are the two reasons why Lehman and
5 Francis are so far apart. I guess three if you're going to put
6 the taxes in as well.

7 With respect to business valuation, as I indicated
8 Mr. Francis, I don't think, is a business valuation expert. He
9 didn't do a business value analysis. Mr. Lehman did a cap rate
10 analysis, which I think is appropriate. There was no
11 criticisms about the different -- the methodology he used or
12 the factors that he used in doing the cap rate or that he used
13 the wrong cap rate. He came up with the loss -- using 1999's
14 numbers and the money that Nu-Tech should have earned in 1999,
15 he did a cap rate of what the business value should have been
16 had this requirement of contracts not been broken. Lehman's
17 number was 5.8 million. That's -- and that's Exhibit 12 to
18 his -- I want -- Judge, if you have -- because for the next
19 point it would be helpful if you had Mr. Lehman's --

20 THE COURT: I have it right here.

21 MR. SCHWARTZ: Okay. Exhibit 12 to his declaration
22 is where he walks through how he did his cap rate analysis.
23 Because my suggestion to you, Judge, is let's assume that
24 Mr. Francis was right and his lost profits were 2.1 --

25 THE COURT: I'm sorry. I don't think it's 12.

1 That's just his summary of estimated damages final. Is it
2 somewhere in this --

3 MR. SCHWARTZ: Let me see. I think it is, Judge.
4 It's -- it's the document -- it says at the top Nu-Tech
5 estimated loss value of business, final. It's about half way
6 through the -- mine is two-sided.

7 THE COURT: I'll just flip through till I get to it.
8 Okay.

9 MR. SCHWARTZ: Okay. That's his -- that's how he got
10 to his cap rate of the 5.8 million. That's the formula that he
11 used, which I think is the appropriate formula in determining -
12 -

13 THE COURT: Oh wait, maybe I didn't find it. What is
14 the heading again?

15 MR. SCHWARTZ: It says at the top Nu-Tech --

16 THE COURT: Nu-Tech estimated lost value of business?

17 MR. SCHWARTZ: Yes.

18 THE COURT: Okay.

19 MR. SCHWARTZ: All right. That's the methodology he
20 used. If you assume that Mr. Francis is right that the loss --
21 that everything he said was right, that the lost -- the total
22 lost profits should have been two million, one. To come up
23 with a cap rate, because he didn't do it, but if you -- to
24 figure out what lost value, with his numbers, you would input
25 the 2.1 million for where you got the 4.4 in Lehman's and you

1 would do the exact same methodology. That would give you a
2 business loss of 3.4 million dollars, using Mr. Francis' number
3 for 1999 -- for the -- to the loss of value business.

4 Excess costs, Judge, they are what they are and I
5 have nothing to add to that. And then the last point that I
6 have on damages, Judge, and I pointed out to the -- I pointed
7 you to the statute in the brief and I gave you how to compute
8 it. Michigan has a mandatory pre-judgment interest statute.
9 The interest rate fluctuates every six months so you actually
10 have to do a computation to come up with the number. But
11 whatever number you come up with, Judge, Nu-Tech is entitled to
12 the last five years of interest that has run on that while this
13 case has been pending. That's mandatory not discretionary.

14 Do you have any questions of me or my witnesses?

15 THE COURT: No, I -- I wouldn't question the
16 witnesses after I've heard argument.

17 MR. SCHWARTZ: Okay.

18 THE COURT: But as far as the lost value of the
19 business is concerned, what is your response to the debtor's
20 argument that you're double counting?

21 MR. SCHWARTZ: There isn't a double -- the lost -- if
22 you look at the schedule that we're on right now, the estimated
23 value of business final. The lost profits are the profits that
24 that business should have earned in 1999. And had those
25 profits flowed through the books -- the value of the business

1 is what the fair market value would be. There's methodologies
2 to calculate that, like the cap rate.

3 If you look at Mr. Lehman's -- this schedule, he
4 starts with lost income, lost profit. He takes off taxes. He
5 gets to the net income. He uses the cap rate to tell you the
6 total lost value. Then he deducts the profits. They're
7 claiming it's a double count, it's right in his calculation
8 that he deducted it. This is -- this is the same Exhibit 12.
9 And then he deducted the sale to RPT, which was appropriate
10 also, that's what lowered the number. So I think, if you read
11 his schedule accurately, you can see there's not a double
12 count. They're different components of loss.

13 THE COURT: Let me just go to one other point. Does
14 his valuation of the lost value of the business assume that
15 the -- that but for Delphi's breach the agreement would be in
16 place going forward?

17 MR. SCHWARTZ: It assumes that the lost business
18 value is based on '99's number. That's the profit numbers that
19 he used. So it's assuming that they would have continued --
20 the contract would have been in place up to the time of the RPT
21 sale.

22 THE COURT: Well, let's stick on that for a second,
23 then.

24 MR. SCHWARTZ: Okay.

25 THE COURT: Does it then assume that the contract

1 would be in place beyond the RPT sale --

2 MR. SCHWARTZ: It assumes --

3 THE COURT: -- if there had not been such a sale?

4 MR. SCHWARTZ: No, you're right, Judge. It assumes
5 that the contract was still in place through 2000. What a
6 buyer would have -- what a buyer would have come into Nu-Tech
7 and would have seen in 1999 was the contract was in place if
8 they were willing to buy it what the fair market value would
9 have been.

10 THE COURT: But if you -- if the buyer shows up, for
11 example, in November of 2000, there's not much to see there.
12 There's a month.

13 MR. SCHWARTZ: Depending -- with what happened here,
14 yes. But that's not --

15 THE COURT: Well, that's my question. Is he assuming
16 renewal of that contract, going forward?

17 MR. SCHWARTZ: No. To do a cap rate analysis doesn't
18 assume -- it assumes what the value of -- what the fair market
19 value is of that business, based upon its financials. I didn't
20 do it based on 2000's numbers because of the RPT sale, because
21 the contract was ending, he does that in '99's numbers.

22 THE COURT: But the contract is limited in time. So
23 anyone buying the business would ask whether the contract's
24 going to be renewed.

25 MR. SCHWARTZ: That's true. But -- that is true,

1 Judge. But that's also making an assumption that had this not
2 been breached, that Nu-Tech wouldn't have continued to grow,
3 wouldn't have gotten other contracts. That was the history up
4 until that point.

5 THE COURT: But how is that attributable to Delphi?

6 MR. SCHWARTZ: In doing the cap rate analysis, Judge,
7 it's not.

8 THE COURT: Okay.

9 MR. SCHWARTZ: The cap rate looks at what the
10 value -- what -- looking at the business' financials today,
11 what the fair market value is.

12 THE COURT: But again, that goes to my question which
13 is, when you look at the value today, is his analysis assuming
14 the value of a contract that expires at the end of 2000?

15 MR. SCHWARTZ: Yes.

16 THE COURT: And how is that taken into account?

17 MR. SCHWARTZ: Because, I believe and maybe I'm
18 misstating it, but I believe it's based on 1999's performance
19 applied to the cap rate. The cap rate takes into account a
20 variety of factors; the size of the business --

21 THE COURT: Including the expiration of the contract?

22 MR. SCHWARTZ: I don't know. I can only say I don't
23 know. I believe it's the size of the business, the industry
24 amongst many others.

25 THE COURT: But the business has shown -- implodes if

1 you don't have that contract.

2 MR. SCHWARTZ: The business did implode without the
3 contract. I agree with you.

4 THE COURT: So I don't -- that's why I -- I'm having
5 a hard time seeing that a snapshot that doesn't consider the
6 fact that the contract is limited in time.

7 MR. SCHWARTZ: Because had they not -- there's no
8 evidence that this company would have gone out of business and
9 not gotten another contract in 2000 or another one in 1999.

10 THE COURT: I don't understand that. Why?

11 MR. SCHWARTZ: Because the --

12 THE COURT: Why should I assume that there would be a
13 no contract when they pulled the -- pulled the equipment and
14 according to Mr. Cooper's testimony he'd laid off the workers,
15 he wouldn't have them work for more than, you know, a week or
16 so.

17 MR. SCHWARTZ: And all of that happened because of
18 Delphi's actions of not fulfilling the requirement contracts.
19 That's the damage that was lost.

20 THE COURT: No, but at the -- at the -- but --

21 MR. SCHWARTZ: Had there not been this damage,
22 Judge -- and maybe I can approach it a different way. Maybe
23 I'm not explaining it well. There would have been another 4.4
24 million dollars of income into this business to reinvest, to
25 try to get other business, to get other tools, to expand. And

1 all of that has value to a business.

2 THE COURT: Okay.

3 MR. SCHWARTZ: And again, Judge, I know you're -- I
4 heard your admonition you don't want to hear from the witness
5 but if you want to ask Mr. Lehman that question, he is here.

6 THE COURT: No, I'm not --

7 MR. SCHWARTZ: It's because it's a theoretical
8 question that I can't answer any more than I did.

9 THE COURT: I -- I'm not going to ask any witness
10 questions after they know the answer to be given. And I
11 appreciate he's an expert but I'm not going to do that.

12 MR. SCHWARTZ: Okay.

13 THE COURT: Was -- is there anything in the record
14 about Mr. Maley's health problems and when they started?

15 MR. SCHWARTZ: The only -- what was in the record was
16 at the -- in -- this case was set for trial in April, I
17 believe, 2005. There was a motion filed by GM and Delphi
18 indicating that Mr. Maley had had a stroke and wanted an
19 adjournment of the trial, which Nu-Tech opposed and the Court
20 granted. That was in the record in both sides. It was never
21 corroborated but there was a representation of that.

22 THE COURT: All right. But certainly nothing going
23 back to 2000 or 1999?

24 MR. SCHWARTZ: No, that was the first time there was
25 any health issue.

1 THE COURT: Okay. All right. Okay. Thank you.

2 MR. SCHWARTZ: Thanks, Judge.

3 MR. HOGAN: Judge, Al Hogan for the debtors. Your
4 Honor, I actually intend to be rather brief. I'm mindful that
5 the Court has read the submissions and heard plaintiff's
6 discussion. If the Court has any specific questions I'm happy
7 to address those first to make sure that we --

8 THE COURT: Okay. Well, yeah -- why don't -- I just
9 want to go over some things that Mr. Schwartz said and hear
10 your response to them. The first one is, why shouldn't I rely
11 upon the letter from GM's counsel referring to his
12 understanding that under Section 2.01 of the Master Separation
13 Agreement, DAS, LLC, assumed the -- the '98 agreement?

14 MR. HOGAN: Right. Judge, I suppose the -- the first
15 thing of that is that's General Motors assertion in -- in a
16 letter to the debtors. The exhibit right behind that, Exhibit
17 42, is the debtor's response where we reject that request. And
18 so, it's certainly not an admission on the behalf -- on behalf
19 of Delphi.

20 I think that the separation agreements in this --
21 that govern the spinoff are -- are publicly available. And
22 although the parties did not debate it and haven't addressed
23 it, my understanding of those agreements and what the -- the
24 Exhibit 41 --

25 THE COURT: I thought they -- they are publicly

1 available?

2 MR. HOGAN: Yeah, I think the Master Separation
3 Agreement is publicly available. It was filed at the time of
4 the --

5 THE COURT: Was it filed with the 10K or 10Q or
6 something like that?

7 MR. HOGAN: I think it was filed with a K around the
8 time of the spinoff. And I think it's also been recently --
9 yes, it was filed publicly back at the time of the spinoff.
10 And Judge, I think that you're seeing on those two letters are
11 -- is an exchange between General Motors and Delphi. Again,
12 it's not conclusive at all but it relates to the relationship
13 between GM and Delphi under those separation agreements. My
14 understanding of them is that there were no third-party
15 beneficiary rights created as to others. And so, the procedure
16 that you're seeing here is actually the one that --

17 THE COURT: So you're saying it's an indemnification
18 right?

19 MR. HOGAN: I -- I think -- I wouldn't want to use
20 that phrase, Judge, because I don't have the -- that's not in
21 the brief and so I didn't discuss it. But what I believe the
22 proper procedure here is, is what happened and that is that the
23 plaintiff sued General Motors. I think that was glossed over
24 in --

25 THE COURT: No, that's in the letter. It's -- it's -

1 - that comes out of General Motor's counsel's letter.

2 MR. HOGAN: Correct. Correct. And so there's no
3 doubt that when -- when the spinoff occurred and whatever
4 happened between GM and Delphi, there's no question that
5 whatever causes of action Nu-Tech or anyone else had against
6 GM, they still had against GM. And suing GM is the proper
7 thing to do if you believe that they breached a contract with
8 you. And that's what Nu-Tech did in this case.

9 Whether or not vis a vis GM and Delphi, Delphi
10 assumed to indemnify that's a separate issue from whether or
11 not that agreement vested any rights in any third parties. And
12 again, my understanding is that it specifically did not create
13 third-party beneficiary rights as to any -- any parties like
14 Nu-Tech.

15 THE COURT: Okay. But as I understand it, there was
16 a settlement between GM and Nu-Tech, right? There's no
17 judgment?

18 MR. HOGAN: That is correct, Judge.

19 THE COURT: So you can't -- you're not pointing to
20 the one recovery rule here.

21 MR. HOGAN: No. I'm not saying that the --

22 THE COURT: You're not relying on the one recovery
23 rule.

24 MR. HOGAN: I'm not relying on the one recovery rule.
25 We're relying specifically on the fact, and I think Your Honor

1 was discussing this in your points, as to the corporate
2 entities which are now the debtors, the first contract that was
3 issued on behalf of a corporation that had a legal existence
4 was the May 1999 purchase order from DAS, LLC.

5 THE COURT: Okay.

6 MR. HOGAN: If there were multiple parties, multiple
7 legal entities, liable under any previous agreement I don't
8 think the payment in this case would -- it's not the one
9 payment rule that solves it, I agree.

10 THE COURT: Okay. What is your -- do you have a view
11 on Mr. Schwartz' theory that under the RPT purchase transaction
12 New Tech reserved for itself any contract breach causes of
13 action that arose before the closing?

14 MR. HOGAN: I've got a pretty strong view on that
15 one, Judge. And that is I think the discussion that Your Honor
16 had was there are two agreements there. The second agreement
17 clearly sets forth what was being assigned. Mr. Schwartz,
18 several times, characterized this as an intangible kind of
19 asset. If you look at the purchase agreement, the supplement,
20 in paragraph 1.1 it says that what is being assigned is all the
21 assets' rights and interest of every conceivable kind or
22 character whatsoever, whether tangible or intangible, that on
23 the effective date were owned by the seller. That -- and then
24 -- and then it lists specific things with respect to that. And
25 one of those is purchase orders. So that's in -- that's in

1 article 1, section 1.1 and 1.1(c). I don't know how to read
2 that other than -- and then we decided the Michigan case law
3 that says as a matter of course --

4 THE COURT: Well, but then he points to the excluded
5 assets definition.

6 MR. HOGAN: Yeah. The excluded assets is an
7 interesting clause but I think the excluded assets, which is
8 1.4(d) says those assets, not specifically included in the
9 above paragraphs. So it says, go back up and read everything
10 that precedes this sentence. And because purchase orders are
11 specifically identified in 1.1(c) and because the -- the scope
12 of what was being given away with respect to those purchase
13 orders is also defined in 1.1(c), it's explicit. It's whatever
14 tangible or intangible assets or rights or interest that they
15 have. I think it's pretty clear that this asset agreement, on
16 its face, transferred everything with respect to those purchase
17 orders on -- as of the effective date.

18 And I think it's -- it's plain from the reading when
19 you read 1 -- 1.1 through 1.4. So I disagree quite strongly
20 there, Judge.

21 THE COURT: Well, I mean, he relies heavily on
22 1.4(d).

23 MR. HOGAN: Yes.

24 THE COURT: That's really what he hangs his hat on.
25 That the excluded assets are everything not specifically or by

1 inference, included in the above paragraphs or the attached
2 exhibits.

3 MR. HOGAN: Right. And I read the above paragraphs
4 as everything that precedes in article 1.

5 THE COURT: So you include 1.3, 1.2, and 1.1 as the
6 above paragraphs.

7 MR. HOGAN: Yes, I would look at it and see
8 everything preceding that is -- is excluded. Everything
9 preceding that is specifically spelled out as being
10 transferred.

11 And Judge, you know, the other thing is that there's
12 certainly no -- there's no explicit indication anywhere, even
13 in the excluded assets paragraph, that causes of action are --
14 that are being specifically reserved. And in this case,
15 given -- and we'll accept it as true, that the part in question
16 was -- was an important part. And if you believe that there
17 was a breach the failure to mention that is striking. I think,
18 instead, everybody knew where the state of the world was as of
19 the end of 1999 and that is that these tools had been removed.
20 And I don't think there was anything other than were giving you
21 everything with respect to this purchase order, as of the date
22 of this transfer.

23 The fact of the matter is, Delphi issued a subsequent
24 purchase order to RPT the next day. And there was nothing --
25 there was nothing -- no issue raised there, no problem, no note

1 was made of that. So everybody, including Delphi, appeared
2 to -- at least on our systems, we appeared to acknowledge that
3 the rights, with respect to these purchase orders, had been
4 transferred.

5 So Judge, I think -- I think the agreement is clear
6 that the --

7 THE COURT: Have you -- have you read the cases that
8 Mr. Schwartz cited on non-proper party plaintiff?

9 MR. HOGAN: Yes I have, Judge.

10 THE COURT: Not the ones he cited in his brief but
11 the ones he cited at oral argument?

12 MR. HOGAN: No, I have not.

13 THE COURT: Okay.

14 MR. HOGAN: The ones cited at oral argument, I don't
15 believe we've seen before. The one cited in the brief, I
16 believe went -- the primary case you relied on was the
17 jurisdiction --

18 THE COURT: No, I read those.

19 MR. HOGAN: You got those? You know, Judge, I
20 haven't seen those other cases. I think however, Judge, the
21 Michigan Supreme Court case that we cited is very recent. It
22 is from the Michigan Supreme Court. It's quite clear it
23 establishes, without question, that the real party in interest
24 must be party to the lawsuit prior to the time that the statute
25 of limitations expires. And Judge, in that case it's not a --

1 the -- several Courts have even said, it may seem like a harsh
2 rule but it's not a question of notice, it's not a question of
3 anything like that. The Michigan Supreme Court in that case,
4 the named plaintiff was the actual injured party. And the fact
5 that the --

6 THE COURT: No, I -- I know.

7 MR. HOGAN: -- real party interest. So that's --

8 THE COURT: -- I read the case.

9 MR. HOGAN: It's very clear from that standpoint.

10 The other two cases that we cited from the Michigan Court of
11 Appeals are unpublished. They're not binding authority but
12 they're certainly precedential. They're certainly persuasive.
13 And they go right to the point. Those actually do say that if
14 the real party in interest is not a party to the lawsuit and
15 the statute of limitations expires that the initial complaint
16 just doesn't toll. So I think the -- I think the rule is very
17 clear there. I think it fits in precisely with the fact
18 pattern we have. There's certainly no authority that I've
19 seen, and I haven't seen those other cases to the contrary.

20 THE COURT: Have you -- have you considered Mr.
21 Schwartz' estopple point?

22 MR. HOGAN: The estopple point -- I know he cited the
23 Penny case and the -- and Judge, we actually hadn't found the
24 case that you quoted from. The Penny case, to me, seemed to be
25 a situation where counsel was affirmatively hiding information.

1 Where they were taking steps.

2 THE COURT: He cited the Michigan court rule about
3 having to disclose the capacity to sue or be sued.

4 MR. HOGAN: Right. The Michigan court rule with
5 respect to pleading, I think, is a pleading rule. I don't
6 think it's an equitable estoppel rule. I don't believe --

7 THE COURT: But he says it sets up a duty and you
8 need a duty -- I mean, one element of equitable estoppel is
9 that there be a duty.

10 MR. HOGAN: I'm sorry, Judge?

11 THE COURT: One element of equitable estoppel is that
12 the -- a duty have been -- has been breached. A duty to
13 disclose.

14 MR. HOGAN: Judge, I think, first of all it said --
15 the pleading rule, and I hadn't seen it before, it wasn't cited
16 in the papers. The pleading rule goes to the -- the complaint
17 or the amended complaint. And clearly that, in this case, what
18 happened was a new defense did come in apparently, I'll take
19 counsel's representation in the prior pleadings it wasn't
20 there. A new defense came in before the pendency of the
21 statute of limitations. It said quite clearly that they were
22 going to raise a statute of limitations defense and it
23 indicated that another defense was that Nu-Tech did not have
24 standing.

25 Now, the other fact that was not hidden from Nu-Tech

1 was that they had entered into this asset purchase agreement.
2 So equitable estoppel is -- it's certainly a balancing test,
3 there's equities here. I think the case that Your Honor cited
4 seems to indicate that it's not a party's job to warn someone
5 when they are about to let their rights lapse. And I think
6 here we're with --

7 THE COURT: But you said that the amended pleading
8 did raise this question --

9 MR. HOGAN: Yes.

10 THE COURT: -- before the limitations period expired?

11 MR. HOGAN: Yes, Judge. The amended pleading -- and
12 it was closed. The amended pleading was December 20th.

13 THE COURT: It didn't raise the statute of
14 limitations issue though, it just raised the standing issue?

15 MR. HOGAN: No, it did raise the statute of
16 limitations issue.

17 THE COURT: It did. But that wasn't the subject of
18 the summary motion?

19 MR. HOGAN: It doesn't appear that it was presented
20 in --

21 THE COURT: That way. But it was --

22 MR. HOGAN: -- that fashion.

23 THE COURT: And that amended answer is in the record?

24 MR. HOGAN: Yes it is, Judge. It's in --

25 THE COURT: Okay. I'll find it.

1 MR. HOGAN: Okay. It's the -- we'll have it for you
2 in just a moment. It's tab 28. It's page 5 of that amended
3 answer, I believe, if I have it correctly.

4 So Judge, I don't think equitable estoppel. I think
5 the -- that doctrine applies and circumstances are far more
6 egregious here where you have the different kind of conduct.
7 And because of that, Judge, I think that's a completely
8 dispositive issue in this case. I think it's clear that the
9 statute of limitations expired. The real party in interest was
10 not a party to that lawsuit. I think they tried to cure that
11 after the fact and whatever sympathetic note that might get,
12 the Michigan courts are quite clear in the Miller cases, the
13 one that's the most striking in this respect, is that that is
14 simply not -- not permissible. That that cure does not -- does
15 not happen.

16 Judge, if you have any other questions with respect
17 to the statute of limitations argument, I'm happy to answer
18 them but I think it's -- our argument's pretty straight forward
19 there.

20 THE COURT: Okay.

21 MR. HOGAN: Concerning -- Judge, concerning -- I'll
22 go in, sort of, second order. Concerning the purchase orders
23 at issue here, there's not doubt Delphi stands before you, and
24 other Courts, often and talks about requirements contracts.
25 The May 1999 purchase order issued by DAS was a requirements

1 contract. There's -- discussing things like equity here,
2 Judge, I think it's striking -- we talked about it from a
3 mitigation of damages point of view but there's also no doubt
4 that when that requirements contract was issued Nu-Tech didn't
5 have the tools to produce this part. There's --

6 THE COURT: But that, kind of, begs the question. Why
7 did DAS enter into the contract?

8 MR. HOGAN: Judge, it sure does. I tell you -- we
9 got everyone here you don't want to ask questions --

10 THE COURT: And there's no real answer that, I think,
11 contradicts the contract which is that they entered into it.

12 MR. HOGAN: Judge, we're not -- we're not contesting
13 for a moment that that contract was issued, whether it was a
14 requirements contract, I wish I could but I can't.

15 THE COURT: Okay.

16 MR. HOGAN: The only evidence in the record was from
17 Ms. Weber and she said --

18 THE COURT: She thought it might have been a mistake.

19 MR. HOGAN: -- mistake.

20 THE COURT: But it's there so --

21 MR. HOGAN: It's there. But -- but Judge, if we're
22 talking about, sort of, any kind of an equitable undertone
23 here, I think it is important to note that it looks like that
24 was a mistake. And a party then seeking to take advantage of a
25 mistake, I believe, had a duty to do something more than record

1 modification.

2 THE COURT: Well, what about the fact, though, that
3 DAS also entered into a contract which it termed an amendment
4 with RPT?

5 MR. HOGAN: That's another good question. I think
6 that there's no evidence on the record on that and I would say
7 it's, once again, a mistake. My best guess here.

8 THE COURT: I mean --

9 MR. HOGAN: Yeah.

10 THE COURT: A couple of mistakes at that point.

11 MR. HOGAN: A couple of mistakes.

12 THE COURT: Okay.

13 MR. HOGAN: I think, Judge, what you see -- but it's
14 interesting, what you see is that the evidence indicates that
15 there's the June 1998 purchase order, then there is the August
16 purchase order, that's happening during a period of a systems
17 transition. And then you see the May 1999 purchase order and
18 that's happening right at the time that you actually are seeing
19 the legal entity DAS, LLC, emerge to the public and so you get
20 that. And then the third one happens when you get a change in
21 the underlying vendor. And there's no evidence on this record,
22 one could speculate that there's automatic things that happen
23 in circumstances like that but there is no evidence --

24 THE COURT: Well, there's no evidence either way on
25 that.

1 MR. HOGAN: There's no evidence either way, that's
2 exactly right. But Judge, there's also no question that
3 everybody understood that when the May 1999 purchase order was
4 issued Nu-Tech didn't have the parts. And now to claim
5 multiple months and years of damages without addressing that
6 issue --

7 THE COURT: Well, but what about the point that, you
8 know, there's a termination provision and they do have the
9 right to wait don't they? They could either declare a breach,
10 an anticipatory breach, or sit and wait for performance?

11 MR. HOGAN: Judge, I don't know. I -- the case law
12 on that -- you know, it's interesting. Probably in the
13 harshest view that might be correct but one would also say that
14 -- that the breach became -- at some point the breach became
15 fairly obvious. And -- and to not -- not raise this issue --
16 there's nothing in the record in terms of, certainly no written
17 correspondence of any nature, indicating that this was raised
18 with Delphi. And at the end of 1999, when the rapid technology
19 transaction was taking place, one would think, if this was a
20 right that people really intended to assert, that there would
21 have been some clarity at that point.

22 So I'm not -- I'm not going to say that people
23 shouldn't be held to their contract. We simply aren't going to
24 -- Delphi's not going to take that position. But I do want to
25 point out, from the equitable arguments that plaintiffs makes,

1 it's not entirely clear that there was best efforts here to try
2 to -- to mitigate damages in 1999.

3 So Judge, with respect to the earlier purchase
4 agreements, I think we spelled it out pretty clearly in our
5 papers. The August 1998 purchase agreement was not issued by a
6 Delphi that was an existing legal entity. It was -- and the
7 world was well aware that Delphi was a name that was developing
8 a branding center with General Motors. That had been happening
9 for quite some time. But it was also quite well publicly
10 announced when that entity was its own distinct legal actor.
11 And so the fact of the matter is, General Motors Corporation
12 still appears on that 1998 purchase order. It's not until you
13 get to the May 1999 purchase order that it's obvious now that
14 you're dealing with Delphi Automotive Systems, LLC.

15 THE COURT: Okay.

16 MR. HOGAN: And if you've got no other questions with
17 respect to the purchase order issue, I'll touch, very briefly,
18 on damages.

19 I can start where you left off with plaintiff's
20 counsel, that is I think that the reason why you don't see that
21 I'm just -- it strikes me that breach of contract damages are
22 just traditionally measured as the lost profits under the
23 contract. It puts you in the position that you would have been
24 in. The reason that you don't see the kind of forward looking
25 damages projections is just where Your Honor was going and that

1 is that there's no question if you're doing business valuation,
2 that valuation is based on the future anticipated earning
3 streams of the company. And Mr. Lehman actually did
4 acknowledge that in his deposition. So I just don't think this
5 is a proper -- putting aside the disputes that we have, and
6 Your Honor has seen the expert reports, but putting aside the
7 technical differences, I just don't think this is a proper
8 measure for breach of contract damages. I think the Sixth
9 Circuit spoke to that pretty clearly, interpreting Michigan law
10 finding that lost profits -- lost business value, when it flows
11 from a lost profits, kind of, measure just aren't appropriate
12 and I think that's the case here.

13 Judge, with respect to the other damages period, if
14 we're unsuccessful in the statute of limitations argument,
15 again going back to where we were with which entities issued
16 the purchase orders here, it's pretty clear that even under --
17 even under the plaintiff's view that those damages terminated
18 as to lost profits when the purchase orders were assigned. And
19 Delphi issued the new purchase order to RPT and the period
20 should begin no sooner than May 1999 and it should be
21 calculated based on the lost profits measure. Mr. Francis sets
22 that forth in his report and the numbers that we believe would
23 be appropriate are there for Your Honor to consider.

24 Judge, that's all I have on damages and so if you
25 have any other questions I'd be happy to answer them but I

1 think that's it.

2 THE COURT: Okay.

3 MR. HOGAN: Thank you, Judge.

4 THE COURT: I had one question for you, Mr. Schwartz,
5 on damages. You had mentioned the -- that you thought that the
6 GM report on the purchases from Delphi of the part was
7 potentially flawed because it didn't list all purchases that GM
8 made, is that right? Is that how --

9 MR. SCHWARTZ: It didn't -- my understanding is that
10 the -- there's a GM GPSD report, Ms. Weber explained, that
11 would track every part of this part that was made during that
12 period of time.

13 THE COURT: By whom though?

14 MR. SCHWARTZ: By whoever -- whoever Delphi
15 contracted it to.

16 THE COURT: Okay.

17 MR. SCHWARTZ: The report that we were given is an
18 accounts payable report. The GM accounts payable report.

19 THE COURT: From GM?

20 MR. SCHWARTZ: Right.

21 THE COURT: But isn't this part -- but wouldn't -- I
22 guess this is my question, and it's not a rhetorical question,
23 was -- if -- GM would have purchased through Delphi, wouldn't
24 it, those parts? It wouldn't have purchased them from the
25 subcontractors?

1 MR. SCHWARTZ: If GM was the one purchasing from
2 Delphi, yes. Delphi wasn't -- again, after-market parts -- if
3 Delphi was selling to other people it didn't go to GM. GM
4 tracks it because they go in GM vehicles.

5 THE COURT: Okay.

6 MR. SCHWARTZ: So they said they -- my understanding
7 of the program is they need it for warranty purposes. And
8 Judge, maybe --

9 THE COURT: I mean, no one else made this -- no one
10 else used this part, right? So -- so you're limiting it to,
11 like, repair shops that would order instead of GM?

12 MR. SCHWARTZ: Or dealers, yes. They went into GM
13 vehicles -- my understanding is these only went into GM
14 vehicles.

15 THE COURT: Okay.

16 MR. SCHWARTZ: The part.

17 THE COURT: All right. I understand. Is there
18 anything in the record that would clarify that point, Mr.
19 Hogan, that -- whether --

20 MR. HOGAN: Judge, I don't believe so.

21 THE COURT: -- whether Delphi sold this part to
22 entities other than GM?

23 MR. HOGAN: Judge, I don't believe that they're --
24 first of all, I don't believe -- think there's any evidence on
25 that point. I think everything indicates that Delphi sold this

1 part only to General Motors. I think other -- also --

2 THE COURT: Well, but there's -- I mean, is there
3 anything that says that in the record?

4 MR. HOGAN: No. No, there's not but there's no
5 purchase order or anything else that indicates anything to the
6 contrary.

7 THE COURT: Okay.

8 MR. HOGAN: Any more -- any more questions on the GM
9 volume?

10 THE COURT: No.

11 MR. HOGAN: Okay. Thank you, Judge.

12 THE COURT: All right. As you -- I think probably
13 both of you know it, certainly Mr. Hogan knows, my normal
14 practice is to rule from the bench. And in this case, in
15 addition to the other reasons why I like to rule from the
16 bench, it's also important to the case to know whether, I'm
17 talking about the Chapter 11 case in general, to know what the
18 debtor's claim picture is, the picture for allowed claims.

19 This is a fairly large claim, as asserted. So I'm
20 going to ask Mr. Lyons is -- is determination of this claim
21 something that -- that is important to know before the
22 confirmation hearing or is this something that can await, if I
23 ask for it, further briefing on a couple of issues that were
24 raised or responses that were raised at oral argument?

25 MR. LYONS: Your Honor, it is important. We are

1 currently above the 1.45 and this is the -- I think this is
2 the -- has the largest variance.

3 THE COURT: All right. Then what I'm going to do is
4 ask the parties to focus on two points that Mr. Schwartz raised
5 that I want to focus on. I read the cases the parties cited
6 and some other cases on the issue of the effect of the statute
7 of limitations on a lawsuit that was brought originally by not
8 the proper party. But he cited to me two additional cases that
9 he says are on point on that issue that I had not been aware
10 of. He's also referred to cases and arguments on estopple
11 related to the assertion of the statute of limitations defense.

12 What I would like is, by Monday at 4 for the parties
13 to submit brief, and I really do mean brief discussions limited
14 to those cases and, I guess, any contradictory or supportive
15 cases that would come up in Shepherds or otherwise, that have
16 not been cited by the parties already. As well as brief
17 submissions on the estopple point. And in particular,
18 commenting on the effect of the Michigan court rules that were
19 cited. Those should be simultaneous submissions. My
20 expectation is that they be no more than fifteen pages and I
21 would hope less than that. And I will give a ruling on or
22 before the 17th on it.

23 MR. HOGAN: Judge, one question, the fifteen pages on
24 each issue or combined?

25 THE COURT: No, combined.

1 MR. HOGAN: That's what I thought. Thank you.

2 THE COURT: Okay. Is that clear?

3 MR. HOGAN: Yes.

4 THE COURT: Let me say one more thing, because I know
5 that -- you can sit down. My practice, at times, and I
6 appreciate that the parties have made efforts, I'm sure, to
7 discuss a consensual resolution of this -- of this claim, but
8 where efforts like that have failed in the past, at times,
9 particularly after a hearing like this or a trial like this, I
10 have given the parties a preliminary indication of my views.
11 And that has, at times, helped them to settle the matters
12 before them. And I think it's worthwhile to do that here. But
13 I want to emphasize it is preliminary and I'm perfectly capable
14 of being persuaded by what you submit on Monday. And based on
15 my reviewing, again, certain of the exhibits. But that being
16 said, it is an indicator for you of what the trial court thinks
17 after the hearing. And again, it's based upon a considerable
18 review of the record before the hearing started.

19 I -- oh, I'm sorry; before I do that I'm going to add
20 another item to your -- to your assignment for Monday and that
21 is a discussion of whether I can refer to, as a matter of the
22 record either in the case or the public record, a filing that
23 discloses the actual terms of the Master Separation Agreement.
24 It may be on the Court's docket, I -- I don't know. It may be
25 in a 10K or a 10Q or an 8K but the first issue is whether I can

1 refer to it, I'm pretty sure I can. So I don't think you'll
2 take a lot of time on that but you're free to discuss that.
3 And the second is, to point me to the applicable provisions on
4 the assumption issue.

5 Okay. That being said, and that's another reason why
6 this ruling is preliminary, my preliminary conclusion on this
7 litigation is that I do not believe that the legal entity DAS,
8 LLC, assumed, retroactively, GM's obligations under the Part
9 Purchase Agreement in -- in the May 1999 amendment or impliedly
10 after that time or impliedly after its formation. And I
11 accept, I believe, the fact that it was not formed until
12 September of 1998. That is after the August '98 purchase
13 order. I believe that under Michigan law a plaintiff needs to
14 show more than Nu-Tech has to show implied assumption of an
15 agreement. And I have, I believe, case law to support that.
16 The best way to have showed that would have been that DAS, LLC,
17 paid amounts that GM had owed under the '98 -- August '98 or
18 before purchase orders and that's not in the record.

19 I don't believe the face of the May 1999 purchase
20 order evidences an assumption of GM's obligations existing
21 prior to the date of that order. I've reviewed the language
22 that Mr. Schwartz pointed me to but as I noted at oral
23 argument, that same language as appears in the RPT order, which
24 is also listed as an amendment, amendment number 3. And I
25 believe in both cases one should view those documents as

1 documents going forward and creating liability and obligations
2 for, in the first case, DAS LLC and in the second case RPT on a
3 going forward basis.

4 That being said, it seems to me that in the absence
5 of something in the Master Separation Agreement that would give
6 Nu-Tech third-party beneficiary rights or similar rights, I
7 believe we're looking at damages here for breach of the May '99
8 agreement and not agreements going backwards.

9 It also appears to me, based upon the case law that
10 the debtors have cited that the statute of limitations defense
11 is very strong. I say that first because of my interpretation
12 of what was actually sold under the agreement with RPT and also
13 then based upon the policy behind and the case law interpreting
14 the proper party in interest issue when viewed in connection
15 with an expired statute of limitations.

16 As far as the damages calculations are concerned, I
17 believe that two of the points raised by the debtors in
18 criticism of Nu-Tech's calculation have been clarified and
19 are -- and are probably not well taken. Those are that Mr.
20 Lehman was over inclusive in putting costs in and/or excluding
21 them. That -- i.e., that he took into account division two
22 costs and the like when in fact he says he didn't and there's
23 really no rebuttal of that other than saying yes he did. I
24 haven't seen any rebuttal of that, at least. No one has -- has
25 suitably answered my questions, I believe, about the tax

1 deduction criticism in the debtor's supplemental response but
2 I'm not particularly persuaded by it.

3 However, I think that the raw data of the actual
4 purchases from Delphi by GM should be the starting point as
5 opposed to the CSM data. Although one might increase it
6 slightly based upon Mr. Schwartz' speculation that there may be
7 some other purchasers, notwithstanding that there's nothing in
8 the record to suggest that.

9 And finally, I am quite skeptical about the element
10 of damages pertaining to lost value of the business in light of
11 the nature of this contract and the nature of the relationship.
12 One would assume, I believe, at some point that Delphi would
13 wake up to the fact that it had a termination right and had a
14 contract out there that was serving no purpose for it. One
15 would hope that that would -- that moment when the light bulb
16 would go off would be at least at the time when the May '99
17 purchase order would expire. Assuming that likelihood, I
18 believe that the lost business value argument comes down to a
19 contention that if the business had had that extra cash, on top
20 of the cash it would, somehow exponentially, thrived. My
21 belief is that that is not properly taken into -- that -- that
22 type of damage calculation is too speculative.

23 Now, having said all of that, let me reiterate that
24 it is possible that the cases cited by Mr. Schwartz will change
25 my mind on a key issue. And secondly, that I'll conclude that

1 after reviewing the amended complaint and the court rules, the
2 Michigan court rules, that DAS played fast and loose with Nu-
3 Tech, precluding it from becoming the proper party in interest
4 within the limitations period.

5 And finally, it's conceivable to me, although my
6 understanding of the Delphi/GM relationship is based on the
7 litigation between the parties, that was commenced earlier in
8 this case, is one where there were not intended to be third-
9 party beneficiaries of the Master Separation Agreement. The
10 actual provisions of that agreement may change my mind on that
11 point.

12 I've not addressed, and the parties didn't address at
13 oral argument, the -- the equitable breach claim. But based on
14 my review of Mr. Cooper's declaration and his deposition
15 testimony as well as the dates of the leases, the expiry dates
16 of the leases, and the fact that DAS LLC did enter into a
17 specific contract in May of 1999 in respect of the part, I am
18 quite likely to conclude that the equitable contract claim will
19 not fly. The contract suggests -- the '99 contract suggests
20 that a replacement part was superceded. The leases had already
21 been entered into and were going to run longer than the alleged
22 equitable promise. And moreover, Mr. Cooper is, I believe, too
23 vague in his declaration, particularly when viewed in light of
24 his deposition testimony where he says that he was not told
25 directly about the replacement part issue but rather his -- the

1 other shareholder was, that the alleged agreement is not
2 specific enough to support such a claim.

3 So, again, I look forward to seeing your submissions
4 on those three issues. And I'll give my oral ruling, probably
5 on the day of the confirmation hearing although it's
6 conceivable I'd give it before.

7 MR. LYONS: So, Your Honor, that means see you
8 tomorrow on the Light Source matter?

9 THE COURT: Yes.

10 MR. LYONS: Thank you.

11 (Recess)

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C E R T I F I C A T I O N

I, Pnina Eilberg, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

January 14, 2008

Signature of Transcriber

Date

Pnina Eilberg

typed or printed name